Supreme Court, U.S.
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No. 05-

IN THE SUPREME COURT OF THE UNITED STATES

DIANNE TROUPE, as Personal Representative for the Estate of Ricardo Robinson, Deceased, et al.,

Petitioners,

v.

SARASOTA COUNTY, FLORIDA, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In order to satisfy the "seizure" requirement of a Fourth Amendment excessive force claim, does a plaintiff have to establish that the officer had the intent to cause harm unrelated to the legitimate object of arrest or that he otherwise committed a Fourteenth Amendment due process deprivation?

2. Are the passengers of a fleeing vehicle considered "seized" within the meaning of the Fourth Amendment when a law enforcement officer intentionally fires his weapon at the vehicle with the intention of stopping it and kills the driver, causing the vehicle to crash, where the officer is aware of the presence of passengers inside the vehicle and considers them to be criminal suspects even though the primary target of the officer's actions is the driver of the vehicle?

3. In assessing whether a law enforcement officer's use of deadly force was "reasonable" under the standard enunciated in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989), may the reviewing court conclude, on a defense motion for summary judgment, that the officer's use of deadly force was justified merely because a reasonable officer on the scene "*could have believed*" that the fleeing suspect posed a threat of death or serious bodily harm, or, rather, must the evidence show that a reasonable officer "*would have believed*" that the fleeing suspect's actions posed such a threat?

4. Is a law enforcement officer justified in using deadly force against the unarmed driver of a fleeing vehicle out of a generalized concern for the welfare of unidentified individuals located beyond the immediate surrounding area where neither the driver nor the vehicle posed an immediate threat of death or serious bodily harm to the officer or others?

5. In analyzing the issue of "qualified immunity" under the first prong of *Saucier v. Katz*, 533 U.S. 194, 121

S.Ct. 2151 (2001), is it permissible for the reviewing court to (a) decide the issue solely by reference to whether the officer's actions were "objectively reasonable" under *Graham*, thereby "conflating" the two issues, and (b) credit the defendant officer's version of the material events where it is contradicted by the plaintiffs' version of the facts (as supported by competent evidence) and where plaintiffs' version of the facts supports a claim of excessive office?

6. Does this Court's decision in *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694 (1985), provide a reasonable law enforcement officer with fair notice that it is a violation of the Fourth Amendment to use deadly force against an unarmed suspect set on avoiding capture through a vehicular flight where no law enforcement officers or civilians in the immediate area are at risk from the flight?

7. In assessing the issue of proximate causation under § 1983, does a suspect's decision to avoid apprehension by fleeing in an automobile constitute an "intervening" cause which breaks the chain of causation between an officer's use of deadly force to stop the vehicle and the resulting injuries suffered by the vehicle's passengers following the crash of the vehicle where the vehicular flight preceded the use of deadly force and the officer was aware of the presence of passengers inside the vehicle prior to shooting at the vehicle?

8. Can a law enforcement officer who fired his weapon at a moving vehicle to prevent its escape, but whose shot missed its intended target, nonetheless be individually liable under 42 U.S.C. § 1983 where he (a) "acted in concert" with the officer who fired the fatal shot, (b) was that officer's supervisor, and (c) personally participated in the incident?

9. Where a plaintiff has alleged a claim of §1983 municipal liability based upon a city's "persistent failure to discipline" its police officers, can the reviewing court dismiss such a claim simply because the officers were exonerated by the municipality in the specific incident under review without consideration of prior investigations conducted by the city?

10. Where a plaintiff has alleged a claim of §1983 municipal liability based upon a city's "failure to train" its police officers in the use and limitations of deadly force during vehicular pursuits, can the reviewing court dismiss such a claim on a defense motion for summary judgment where numerous police officers, including the shooting officers, testified that no such training was ever provided?

PARTIES TO THE PROCEEDING

Petitioners are (1) Dianne Troupe, as Personal Representative for the Estate of Ricardo Robinson, deceased; and (2) Leon Waiters, Jr.

Respondents are: (1) Sarasota County, Florida; (2) Geoffrey Monge, (3) William F. Balkwill; (4) Kevin L. Gooding; and (5) Timothy L. Bauer.

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Petitioners, Dianne Troupe and Leon Waiters, Jr., respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Troupe v. Sarasota County, Florida*, 419 F.3d 1160 (11th Cir. 2005), and is reproduced in the Appendix at App. 1a. The opinion of the District Court granting Respondents' Motions for Summary Judgment is unreported and is reproduced in the Appendix at App. 23a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 3, 2005. A timely petition for rehearing and rehearing en banc was denied by the court of appeals on September 29, 2005. Pursuant to this Court's Orders dated December 12, 2005 and February 2, 2006, the deadline for filing the instant petition for writ of certiorari was extended to and including February 26, 2006. The jurisdiction of this Court is thus timely invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in relevant part, that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . "

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no person shall be deprived "of life, liberty, or property, without due process of law."

42 U.S.C. § 1983 provides, in relevant part, that "[e]very person, who under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . for redress"

STATEMENT OF THE CASE

This is a civil rights action under 42 U.S.C. § 1983 involving the use of deadly force to seize a fleeing suspect. On September 30, 1999, Ricardo Robinson, Jr., a 19-year old African-American male, and Leon Waiters, Jr., a 23-year old African-American male, were passengers in a motor vehicle intentionally fired upon by two Sarasota County (Fla.) Sheriff's Deputies, Timothy Bauer and Kevin Gooding. The driver of the vehicle, Ryan Hart ("Hart"), was being sought by police in connection with an outstanding arrest warrant for the non-violent crime of possession of controlled substances with intent to sell same. Hart attempted to avoid arrest by fleeing in his automobile. The two officers, with knowledge that there were passengers inside the vehicle and also believing them to be criminal suspects, fired their weapons at the fleeing vehicle in an effort to prevent its escape. Hart, the driver of the vehicle, was mortally wounded by the gunfire, and the vehicle crashed into a wall approximately ten seconds later, killing Robinson and seriously wounding Waiters.

Despite the fact that numerous witnesses testified that no law enforcement officer was in the path of, or otherwise endangered by, the moving vehicle, a three-judge panel of the United States Court of Appeals for the Eleventh Circuit affirmed the District Court's grant of summary judgment in favor of the Respondents, concluding, *inter alia*, that (1) there was no "seizure" of the passengers because Petitioners "*did not allege that Gooding or Bauer had the intent to cause*

harm unrelated to the arrest," and, further, that the officers' use of deadly force was directed only at the driver of the vehicle, and not the passengers; (2) the driver's decision to flee in his automobile, rather than surrender to law enforcement officers, was the "intervening" cause of Petitioner's injuries; (3) the officers' actions were justified because a reasonable officer "*could have perceived*" that the driver posed a threat of serious physical harm and "*could [have] potentially endanger[ed] more lives*"; and (4) the officers were entitled to qualified immunity based on a determination by the Court that the officers acted reasonably. The Eleventh Circuit also affirmed the dismissal of all claims of § 1983 municipal liability against the Sarasota County Sheriff and the municipality of Sarasota County, Florida.

REASONS FOR GRANTING THE PETITION

I.

The Eleventh Circuit's Application Of A Fourteenth Amendment Standard In Assessing The "Seizure" Issue Undermines This Court's Prior Rulings Identifying The Fourth Amendment As The Proper Constitutional Provision Governing Excessive Force Claims.

In holding that the officers' use of deadly force did not constitute a "seizure," the Eleventh Circuit improperly employed *Fourteenth Amendment* due process principles. Specifically, the Eleventh Circuit stated that (a) the use of deadly force "does not give rise to a *due process deprivation* claim unless it was exercised with 'a purpose to cause harm' unrelated to the legitimate object of arrest"; and (b) "[t]he plaintiffs do not allege that Gooding or Bauer had the intent to cause harm unrelated to the arrest." (App. 15a) (emphasis supplied). The above findings are of no moment to the *Fourth Amendment* "seizure" analysis, and the Eleventh Circuit's holding in that regard is the only known instance in

which a federal appellate court has applied the higher threshold of a Fourteenth Amendment substantive due process claim to the Fourth Amendment "seizure" inquiry.

The Eleventh Circuit's attempt to equate a "seizure" with a Fourteenth Amendment due process deprivation undermines this Court's decision in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865 (1989). In *Graham*, this Court held that "*all* claims that law enforcement officers have used excessive force--deadly or not--in the course of an arrest, investigatory stop, or other "seizure" of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." 190 U.S. at 388, 109 S.Ct. at 1871 (emphasis in original); *see also Saucier v. Katz*, 533 U.S. 194, 204, 121 S.Ct. 2151, 2158 (2001) ("In *Graham*, we held that claims of excessive force in the context of arrests or investigatory stops should be analyzed under the Fourth Amendment's 'objective reasonableness standard,' and not under substantive due process principles."); *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S.Ct. 1694, 1699 (1985) ("there can be no question that apprehension by use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."). The above-cited decisions leave no doubt that that this Court has unequivocally settled the question of the proper constitutional provision under which excessive force claims should be analyzed by lower courts.

Prior to the Eleventh Circuit's decision in this case, no federal appellate court had ever suggested that a Fourteenth Amendment standard applied to an excessive force claim. To prevail on a Fourteenth Amendment substantive due process claim, a plaintiff must demonstrate that the state actor engaged in arbitrary conduct so egregious that it "shocks the conscience." *Collins v. City of Harker Heights*, 503 U.S. 115, 129, 112 S.Ct. 1061, 1070 (1992). Such a standard is rarely, if ever, satisfied in a traditional

excessive force case. Thus, if the Eleventh Circuit's decision were allowed to stand, plaintiffs bringing "excessive force" claims pursuant to § 1983 would hereafter face an unduly stringent standard for establishing a "seizure," and one which is contrary to this Court's rulings in *Graham* and *Saucier*.

II.

The Eleventh Circuit's Ruling That Shooting The Driver Of An Automobile Does Not Constitute A "Seizure" Of The Passengers Conflicts With The Prior Rulings Of This Court And The Decisions of Several Circuit Courts.

In addition to analyzing the "seizure" inquiry under the wrong constitutional provision, the Eleventh Circuit deviated from the precedent of this Court when it held that stopping the driver of a vehicle with deadly force "does not constitute a seizure of [his] passenger[s]." (App. 15a-16a). The Eleventh Circuit's approach would thus limit seizures to "intervention directed at a *specific individual*" (App. 14a), implying that persons not specifically targeted by a police officer cannot be "seized" for Fourth Amendment purposes even if the officer was both aware of their presence and the risk that they faced when he applied deadly force. Such a conclusion is contrary to the principles established in *Brower v. County of Inyo*, 489 U.S. 593 (1989), where this Court held that a Fourth Amendment "seizure" occurs "when there is a governmental termination of freedom of movement *through means intentionally applied*." *Id.* at 596 (emphasis in original). Further, the *Brower* Court cautioned against drawing "too fine a line" in applying the "means intentionally applied" standard, explaining that "it [is] enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result." *Id.* at 599. Thus, a "seizure" can occur for Fourth Amendment purposes "even when an *unintended person* or thing is the object of the detention." *Id.* at 596. (emphasis supplied).

The *Brower* standard has been met in the present case. Regardless of whether Gooding and Bauer actually intended to "seize" the two passengers, the fact remains that they intentionally fired their weapons at the moving vehicle with the intention of disabling it, armed with the knowledge that there were two passengers inside that vehicle. (App. 27a & n.1). Further, not only were Bauer and Gooding aware of Petitioners' presence inside the vehicle, but they also believed them to be criminal suspects, as evidenced by their statements to police investigators following the shooting.

The Eleventh Circuit's "no seizure" holding clearly resulted from its flawed reading of *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708 (1998). In *Lewis*, this Court held that when injury or death results from a high-speed police chase, "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, *necessary for a due process violation.*" *Id.*, 523 U.S. at 836, 118 S.Ct. at 1711-12 (emphasis added). Thus, under *Lewis*, "high-speed chases with no intent to harm suspects physically or to worsen their legal plight *do not give rise to liability under the Fourteenth Amendment . . .*" *Id.*, 523 U.S. at 854, 118 S.Ct. at 1720 (emphasis supplied). Although the Eleventh Circuit specifically cited *Lewis* when it held that stopping the driver of a vehicle does not constitute a seizure of his passengers (App. 16a), *Lewis* is clearly inapplicable here since: (1) Petitioners are not alleging a Fourteenth Amendment due process violation, but, rather, a Fourth Amendment seizure, and (2) the application of deadly force by Bauer and Gooding did not occur in the context of a "high-speed" vehicular pursuit (as in *Lewis*), but, instead, occurred in the front yard of a residential dwelling where the officers were "on foot."

In addition to conflicting with the general principles enunciated in *Brower* and *Lewis*, the Eleventh Circuit's decision--limiting the focus of the "seizure" inquiry to Hart--

is in direct conflict with the decisions of other circuit courts, including the Fifth Circuit and Sixth Circuit, which hold that the application of deadly force at a fleeing vehicle *with the knowledge that there are passengers inside* constitutes a "seizure" of *all* of the occupants inside the vehicle. *See Jamieson v. Shaw*, 772 F.2d 1205, 1210 (5th Cir. 1985) (passenger was "seized" when officers, with knowledge that the passenger was inside and with no reason to suspect her of wrongdoing, used roadblock to stop vehicle); *Fisher v. City of Memphis*, 234 F.3d 312, 315-19 (6th Cir. 2000) (officer "seized" passenger when he fired weapon at vehicle, and bullet went though driver's side window hitting passenger, who was not a suspect). The guiding principle under each of these decisions is that the "*intent to stop a car includes intent to stop everyone inside the car.*" *Keller v. Frink*, 745 F. Supp. 1428, 1432 (S.D. Ind. 1990) (emphasis supplied).

The instant case is analogous to *Jamieson* and *Fisher*. Like the plaintiffs in each of those cases, Petitioners were passengers in a moving vehicle targeted by police, and the officers were admittedly aware of the passengers' presence when they fired their weapons at the vehicle. (App. 27a & n.1). Thus, by intentionally shooting at a vehicle that they knew contained passengers, Bauer and Gooding effectively "seized" everyone inside the vehicle, including both Robinson and Waiters. The fact that Bauer and Gooding also considered them both to be criminal suspects only reinforces this conclusion. Thus, in holding that "stopping a vehicle's driver [did] not constitute a seizure of the passengers" (App. 15a-16a), the Eleventh Circuit made a ruling that squarely conflicts with *Jamieson* and *Fisher*, and review by this Court is needed to resolve a split in the circuits on the issue of whether a "seizure" occurs under these circumstances.

III.

The Decision Below Conflicts With The Prior Rulings Of This Court And Several Circuit Courts By Employing A Subjective "*Could* Have Believed" Standard To The "Objective Reasonableness" Inquiry Under § 1983.

The Eleventh Circuit's "objective reasonableness" analysis likewise conflicts with prior rulings of this Court and other circuits. In holding that Bauer's and Gooding's use of deadly force was "objectively reasonable" under the criteria set forth in *Graham*, the Eleventh Circuit applied a purely subjective standard, concluding that: (1) "a reasonable officer *could have* perceived that Hart posed a threat of serious physical harm," and (2) "Gooding and Bauer perceived that Hart was attempting to escape and *could potentially* endanger more lives." (App. 20a-21a) (emphasis supplied).

The prior rulings of this Court do not support the application of a "*could have believed*" standard. In *Graham*, this Court made clear that excessive force claims are evaluated under the Fourth Amendment's "objective reasonableness" standard. 190 U.S. at 395. Under this analytical framework, the reviewing court must determine whether a law enforcement officer's actions were objectively reasonable in light of the facts and circumstances confronting the officer, without regard to the officer's intent or motivation. *Id.* at 396-97. Such a determination is based on the totality of the circumstances, including, *inter alia*: (1) whether the suspect posed an immediate threat to the safety of the officer or others; (2) whether the suspect was actively resisting arrest; and (3) the severity of the crime at issue. *Id.*

Further, in *Garner*, this Court held that the reasonableness of using deadly force to subdue a suspect hinges on whether "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either

to the officer or others." 471 U.S. at 11. Because there is no precise formula for determining the existence or non-existence of probable cause in the above context, the federal circuit courts have employed two divergent--and wildly inconsistent--approaches for assessing whether a law enforcement officer's use of deadly force was "objectively reasonable." The majority approach--known as the "*would have*" standard--requires a determination of whether a reasonable officer "*would have believed*" that the suspect posed a threat of serious physical harm, either to the officer or others. *See, e.g., Young v. City of Providence*, 404 F.3d 4, 23 (1st Cir. 2005); *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir. 2004); *Clem v. Corbeau*, 284 F.3d 543, 550 (4th Cir. 2002); *Jaffee v. Redmond*, 51 F.3d 1346, 1354 (7th Cir. 1995); *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999).

The minority approach--and the one employed by the Eleventh Circuit--asks simply whether a reasonable officer "*could have believed*" that the suspect posed a threat of serious physical harm, either to the officer or others. *See Wilson v. Flynn*, 429 F.3d 465, 468 (4th Cir. 2005); *Colston v. Barnhart*, 130 F.3d 96, 100 (5th Cir. 1997); *Lowery v. Stovall*, 92 F.3d 219, 222 (4th Cir. 1996); *Pittman v. Nelms*, 87 F.3d 116, 120 (4th Cir. 1996); *Lennon v. Miller*, 66 F.3d 416, 425 (2d Cir. 1995); *Jones v. Webb*, 45 F.3d 178, 184 (7th Cir. 1995); *Reese v. Anderson*, 926 F.2d 494, 501 (5th Cir. 1991).

These standards are not meant to be interchangeable,[1] for there is a world of difference between "would" and "could." *See United States v. Gaudin*, 28 F.3d 943, 963 & n.8 (9th Cir. 1994) (stating that the difference between the

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[1] Incredibly, the Eleventh Circuit has applied both standards, perhaps unaware that there is a distinction between "could" and "would." *Compare, Troupe*, 419 F.2d 1160, 1168-69 (11th Cir. 2005) (espousing "could have believed" standard), *with, Mercado v. City of Orlando*, 407 F.3d 1152, 1157 (11th Cir. 2005) (using "would have believed" standard), and *Kesinger v. Herrington*, 381 F.3d 1243, 1248 (11th Cir. 2004) (same).

two words is "substantial"), *aff'd*, 515 U.S. 506, 115 S.Ct. 2310 (1995). Whereas "could" refers to some probability of indeterminate size, "would" conveys something closely akin to more likely than not. *McFarlane v. Life Ins. Co. of North America*, 999 F.2d 266, 269 (7th Cir. 1993). *See also* Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 Hastings L.J. 657, 665 (March 2005) (noting that the word "could" is used to express a mere possibility, whereas "would" requires significantly more than a tentative possibility).

The "*could have believed*" standard is a particularly inappropriate test for assessing "objective reasonableness" under § 1983, for it allows the defendant officer to escape liability simply because of the *mere possibility*--no matter how slight--that the suspect poses a serious threat of harm. Such a loose standard does violence to this Court's requirement in *Graham* of an "objective" inquiry into the officer's Fourth Amendment activities, and would allow the reviewing court to ignore conflicting evidence which tends to show that the suspect posed no serious threat of harm to the officer or others. Such an approach is especially problematic in the context of a motion for summary judgment under Federal Rule of Civil Procedure 56, where the evidence is to be viewed in the light most favorable to the nonmoving party.

If the Eleventh Circuit's approach were correct, then every police pursuit of a fleeing vehicle would give rise to a right to use deadly force against the driver of the vehicle out of a generalized concern for the welfare of other drivers or civilians who might be endangered. However, numerous circuits, including the Eleventh Circuit in a similar case, have rejected such a quantum leap of the right to use deadly force. *See Vaughan v. Cox*, 264 F.3d 1027, 1034 (11th Cir. 2001), *vacated by* 536 U.S. 953, 122 S.Ct. 2653 (2002), *reinstated and supplemented on remand*, 316 F.3d 1210 (11th Cir.), *vacated and superseded by*. 343 F.3d 1323 (11th Cir. 2003); *Haugen v. Brosseau*, 339 F.3d 857, 867-68 (9th Cir. 2003),

rev'd on other grounds, 543 U.S. 194, 125 S.Ct. 596 (2004); *Abraham v. Raso*, 183 F.3d 279 (3d Cir. 1999); *Acosta v. San Francisco*, 83 F.3d 1143 (9th Cir. 1996); *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993). Thus, the Eleventh Circuit's approach is in conflict with each of these decisions.

Rather than simply speculate whether the fleeing vehicle "*could have*" caused harm to the officer or others (as the Eleventh Circuit did in this case), the majority of circuits instead assess "objective reasonableness" by focusing on the speed of the vehicle and the officer's ability to avoid contact. *See, e.g.*, *Abraham*, 183 F.3d at 293-94 (reversing grant of summary judgment based on evidence that officer was not in front of the vehicle when she fired her weapon; bullet shattered driver's side window, rather than front windshield); *Brosseau*, 339 F.3d at 867-68 (reversing summary judgment based on evidence that the officer fired through driver's side window and fact that bullet entered driver's back near left shoulder blade); *Acosta*, 83 F.3d at 1146-47 (reasonable jury could conclude that officer who fired two shots at driver of vehicle used excessive force; disputed factual issues concerning speed of vehicle and officer's location at time of shooting); *Enyart*, 5 F.3d at 233-34 (fact question as to whether officer unreasonably created encounter by putting himself in path of vehicle precluded summary judgment).

The Eleventh Circuit's "objective reasonableness" analysis is in direct conflict with the Ninth Circuit's decision in *Brosseau*. There, the Ninth Circuit held that a police officer's use of deadly force against a suspected drug dealer, who had just "started pulling away" in a jeep, could be viewed by a jury as unreasonable based upon the location of the bullet-entry wound (i.e., in the back near the left shoulder blade) and evidence (including photographs of the jeep) indicating that the bullet entered through the rear side window. 339 F.3d at 862 & 67. The Ninth Circuit also characterized as insufficient the officer's contention that she

fired her weapon because she feared for the safety of "fellow officers" and "the community at large." Addressing this purported justification for shooting, the Ninth Circuit stated that "it is no more than 'a simple statement' of fear unsupported by objective factors." *Id.* at 868.[2]

The Eleventh Circuit's holding also conflicts with the Third Circuit's ruling in *Abraham*, where an off-duty police officer shot and killed an alleged shoplifter while he was attempting to escape in an automobile. Although the officer claimed that the fleeing suspect had attempted to "run him over" with the vehicle, the Third Circuit reversed the district court's grant of summary judgment in favor of the officer because the physical evidence, revealing that the bullet had entered the vehicle through the driver's side, could lead a reasonable jury to reject the officer's self-serving testimony:

> Although it is true that the security officers all testified that [the officer] was in front of the car, the fatal shot indisputably came through the driver's side window. . . . [This] hardly precludes a jury from finding that [the officer] fired from somewhere along the . . . side of the vehicle and that she was never in front of the vehicle. . . . Based on this physical evidence, a jury could reasonably decide to reject the security officers' testimony. Considering the physical evidence together with the inconsistencies in the officers' testimony,

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[2] Incredibly, the Eleventh Circuit misstates *Brosseau* as standing for the proposition that "it was objectively reasonable for [the officer] to use deadly force against a suspect in an attempt to prevent the suspect's escape and potential harm to others." (App. 20a-21a). Contrary to the Eleventh Circuit's understanding of *Brosseau*, this Court, in *Brosseau*, actually "express[ed] no view as to the correctness of the Court of Appeals' decision on the constitutional question itself." 543 U.S. at 198.

> a jury will have to make credibility judgments, and credibility determinations should not be made on summary judgment.

183 F.3d at 293-94.

As the above cases plainly illustrate, the Eleventh Circuit made two critical errors when it assessed the issue of "objective reasonableness:" (1) it applied a subjective "*could have believed*" standard instead of the objective "*would have believed*" standard; and (2) it resolved all factual conflicts in the light most favorable to the officers, when, on a motion for summary judgment, all such conflicts should have been resolved in Petitioners' favor. Because of the inherent nature of a deadly force case, "courts should be cautious on summary judgment to 'ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story--*the person shot dead*--is unable to testify.'" *Abraham*, 183 F.3d. at 294 (citing *Scott v. Heinrich*, 39 F.3d 912, 915 (9th Cir. 1994)). Thus, a court "should not simply accept what may be a self-serving account by the police officer." *Id.* "It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational fact finder that the officer acted unreasonably." *Id.*

The evidence in this case--much of which was ignored by the Eleventh Circuit in its opinion--belies any notion that Hart's path of flight posed a serious threat to the officers or others. Numerous witnesses, including the lone civilian eyewitness, Regina Weatherington, testified that no officer was in front of or otherwise in the path of the moving vehicle when the shots were fired, and, further, that Hart's operation of the moving vehicle did not pose an immediate threat of death or serious bodily harm to the officers.

Similarly, no civilian was endangered by Hart's operation of the vehicle. Because the surrounding streets had been blocked off by law enforcement officers in advance of the SWAT operation, there was no vehicular or pedestrian traffic on Bahia Vista Street at the time of the incident. Equally important, Bauer, who fired the fatal shots and whose perspective is critical in assessing the alleged threat, testified that he did not observe any civilians in the immediate area.

In fact, the only person who claimed that he was endangered by the operation of the vehicle was Bauer. However, such a claim is contradicted by the following evidence: (1) Bauer's testimony that the vehicle was not traveling at a high rate of speed, and was still in the front yard of the residence when he fired his weapon; (2) Bauer's admission that the front of the vehicle had already passed him when he fired his weapon; (3) Bauer's statement that he "tracked" the driver with his firearm, suggesting careful deliberation on his part rather than a split-second decision; (4) Ms. Weatherington's testimony that no officer or civilian was in the path of the moving vehicle when Bauer fired the fatal shots; (5) the police photographs depicting bullet holes in the driver's side window and driver's side door of Hart's vehicle, indicating that the fatal shots were fired by Bauer while he was positioned on the driver's side of the vehicle and out of harms' way; and (6) the location of the bullet-entry wound in Hart's back, indicating that Bauer may have actually been positioned behind the vehicle when he fired. Based upon this conflicting evidence, there was a genuine issue of material fact as to whether Hart's actions posed a serious threat of physical harm to the officers or others.

In the face of this conflicting evidence, both the Eleventh Circuit and the District Court held (on summary judgment, no less) that the officers' use of deadly force was justified because the fleeing vehicle "*could have*" been a danger to others. (*See* App. 20a-21a). However, the mere

possibility that others might be harmed in the future does not rise to the level of the "immediate" threat contemplated by *Graham*; it is nothing more than pure conjecture and speculation as to how Hart might act in the future should he succeed in avoiding apprehension. Therefore, just as the Ninth Circuit, in *Brosseau*, held that a generalized statement of the possibility of harm to others is not enough to justify the use of deadly force, so, too, here, should Petitioners' excessive force claims be permitted to proceed to trial where both of the lower courts improperly used a subjective "could have believed" standard and there was evidence that Hart did not pose a serious threat of harm to any officer or civilian.

IV.

The Eleventh Circuit's Determination That A Suspect's Decision To Avoid Arrest Through Vehicular Flight Constitutes An Independent "Intervening" Cause Is In Direct Conflict With The Decisions Of Other Circuits.

In holding that the officers' use of deadly force was not the "proximate cause" of Robinson and Waiters' injuries, the Eleventh Circuit determined that "Hart's decision to continue his flight and his continued exercise of control over the Oldsmobile after he was shot 'was the *intervening* cause' of [Petitioners'] injuries." (App. 11a-13a). The Eleventh Circuit's holding is thus the first known instance in which a federal appellate court has espoused the view that a suspect's decision to avoid arrest through vehicular flight constitutes an "intervening" cause which breaks the chain of causation between an officer's use of deadly force to stop the vehicle and resulting injuries suffered by the vehicle's passengers.

If the Eleventh Circuit's view were correct, then *every* fleeing vehicle case (*i.e.*, officer shooting at a vehicle) would result in a finding of no liability based upon the lack of proximate causation. That cannot be so, for the federal

reporters are replete with cases, such as *Brosseau*, *Abraham*, *Enyart*, and *Acosta*, among others, where a § 1983 excessive force claim withstood a defense motion for summary judgment even though the suspect's decision to flee in a vehicle preceded the officer's decision to use deadly force. Even the Eleventh Circuit, in a similar case, has recognized this clear causal relationship. *See Vaughan*, 343 F.3d at 1332 (holding that officer was not entitled to summary judgment in § 1983 excessive force case despite Court's observation that "the danger presented by [driver's] continued flight was the risk of an accident during the pursuit.").

By focusing on Hart's continued flight after being shot, the Eleventh Circuit misapplied the tort law concept of "intervening" causes. In order for an "intervening" cause to relieve an alleged tortfeasor from liability, it must be a cause which could not have been reasonably foreseen or anticipated by the defendant. *See Guttierez-Rodriguez v. Cartagena*, 882 F.2d 553, 561 (1st Cir. 1989) ("a negligent defendant will not be relieved of liability by an intervening cause that was reasonably foreseeable, even if the intervening force may have 'directly' caused the harm."); *White v. Roper*, 901 F.2d 1501, 1506 (9th Cir. 1990) ("The courts are quite generally agreed that foreseeable intervening causes . . . will not supersede the defendant's responsibility."); *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1071 (2d Cir. 1996) ("an actor may be held liable for 'those consequences attributable to reasonably foreseeable intervening forces, including the acts of third parties.").

The Eleventh Circuit's "intervening cause" holding conflicts with the above decisions because it is reasonably foreseeable that fatally shooting the driver of a fleeing vehicle will cause the vehicle to crash, thereby injuring its occupants. This is such a straightforward proposition that it cannot possibly be disputed. *See, e.g.*, *Vaughan*, 343 F.3d at 1333 (stating, in a § 1983 case, that a reasonable police officer

would have known that firing weapon into cabin of speeding vehicle would cause the vehicle to crash); *Jaeger v. Petroni*, 133 Ariz. 174, 650 P.2d 476, 480 (Ariz. Ct. App. [Div. 2] 1982) (trial court erred in giving "intervening cause" instruction in passenger's action against driver of pursuing vehicle even though there was evidence that lead car's increased speed was direct cause of accident).

It is irrelevant, as well as a disputed factual issue, whether Hart remained in control of the vehicle or drove recklessly in the scant few seconds after being shot. After all, he had just been shot in the back by Bauer, and as the Florida Supreme Court noted in a similar vehicular shooting case, "[e]xperience and foresight support the conclusion that [the driver] engaged in such reckless conduct only because he was being chased by police, and that this misconduct would have ceased had the police discontinued the pursuit. There is nothing extraordinary in this conclusion. Accordingly, the issue may not be taken from the finder of fact." *City of Pinellas Park v. Brown*, 604 So.2d 1222, 1228 (Fla. 1992).

The shots fired by Bauer, in particular--which seriously wounded Hart--undoubtedly caused Hart to panic and flee the residence at a much higher rate of speed. Clearly, it is foreseeable--as well as logical--that the firing of a weapon under these circumstances will cause the driver to lose control of the vehicle, and, ultimately, crash. Had Bauer refrained from shooting, Hart would likely not have been incapacitated or lost control of his vehicle. To hold otherwise must necessarily assume that Hart's vehicle would have crashed at precisely the same time and location regardless of whether Bauer had used deadly force, a finding which is contradicted by evidence revealing that Hart accelerated only *after* being shot by Bauer, and that he died and lost control of the vehicle just prior to the crash. The fact that the vehicle crashed less than ten seconds after Hart was shot--0.3 miles from the scene--reinforces this conclusion.

Ultimately, however, this issue, like all questions of proximate causation, is more properly reserved for a jury, and should not have been decided on a motion for summary judgment. *See Stanford v. Kuwait Airways Corp.*, 89 F.3d 117, 127 (2d Cir. 1996) ("Questions regarding what is normal or foreseeable, like other questions of proximate cause, are generally issues for the trier of fact."); *Grover Hill Grain Co. v. Baughman-Oster, Inc.*, 728 F.2d 784, 792 (6th Cir. 1984) ("the determination whether an independent and intervening act is sufficient to cut off the chain of causation is a factual issue."). Accordingly, the Eleventh Circuit's "intervening" cause determination, besides being contrary to the above precedent, was premature at this stage of the proceedings.[3]

V.

The Eleventh Circuit's "Qualified Immunity" Analysis Deviated From The Standard Articulated By This Court In *Saucier v. Katz* Because It Collapsed The "Objective Reasonableness" Inquiry Into Qualified Immunity And Credited The Officers' Version Of The Material Events.

In the "qualified immunity" portion of its opinion, the Eleventh Circuit disregarded this Court's precedent by *conflating* the qualified immunity analysis with the "reasonableness" inquiry. Specifically, in holding that Bauer and Gooding were entitled to qualified immunity, the Eleventh Circuit determined that the two officers acted

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[3] Further, in holding that Gooding's single "missed" shot was not the proximate cause of Robinson's and Waiters' injuries (App. 11a), the Eleventh Circuit ignored the § 1983 "supervisory liability" regime recognized in every circuit, including the Eleventh Circuit. *See, e.g., Jeffers v. Gomez*, 267 F.3d 895, 915 (9th Cir. 2001); *Worrell v. Henry*, 219 F.3d 1197, 1214 (10th Cir. 2000); *Guttierez-Rodriguez*, 882 F.2d at 561. Under this framework, Gooding is liable, even though his shot missed, because he was Bauer's supervisor and participated in the subject incident.

"reasonably," and, in doing so, credited the officers' version of the events rather than view the evidence in the light most favorable to Petitioners, as instructed by *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151 (2001). (App. 17a-22a).

In other words, the Eleventh Circuit "collapsed" the two inquiries into one, and, in doing so, undermined this Court's decision in *Saucier*. In *Saucier*, this Court enunciated a two-step inquiry for assessing qualified immunity under §1983. First, as a "threshold" question, the reviewing court must determine if the facts, "[t]aken *in the light most favorable to the party asserting the injury*," establish that the law enforcement officer's conduct violated a constitutional right. *Id.*, 533 U.S. at 201, 121 S.Ct. at 2156 (emphasis supplied). Second, if a constitutional right would have been violated under the plaintiff's version of the facts, the court must then determine whether that right was "clearly established." *Id.*

Saucier thus makes clear that the qualified immunity analysis is, and must remain, separate from the analysis of the substantive constitutional violation. However, instead of applying the *Saucier* analytical framework independently (and viewing the evidence in the light most favorable to Petitioners), the Eleventh Circuit evaluated the qualified immunity issue solely by reference to whether Bauer and Gooding acted "reasonably" from their perspective. (App. 17a-22a). Such an approach is inconsistent with *Saucier*, and has been sharply criticized by a number of federal appellate courts. *See, e.g.*, *Carr v. Castle*, 337 F.3d 1221, 1226 (10th Cir. 2003) (stating that "[i]n the past some courts addressing the subject of qualified immunity of law enforcement officers, particularly in the context of an alleged unconstitutional use of excessive force, had tended to conflate the qualified immunity inquiry with the constitutional inquiry. But *Saucier* . . . has corrected that perception."); *Bennett v. Murphy*, 274 F.3d 133, 137 (3d Cir. 2002) (stating that, in light of *Saucier*, "the immunity analysis is distinct from the merits of the excess force claim.");

Jones v. Wilhelm, 425 F.3d 455, 460-61 (7th Cir. 2005) ("It goes without saying that the reasonableness of an officer's actions is not a factor in determining whether the facts as alleged constitute a violation of constitutional rights" under *Saucier*).

The Eleventh Circuit's approach further undermined *Saucier* by crediting the officers' version of the events rather than--as is proper--the factual matrix most favorable to the Petitioners. For example, the Eleventh Circuit determined that "Bauer was directly in Hart's path" when he fired his weapon. (App. 20a). Such a finding, however, was contradicted by the following evidence adduced below: (1) Bauer's admission that the front of the vehicle had already passed him when he fired his weapon at Hart; (2) Bauer's admission that he "tracked" the driver with his firearm; (3) the sworn testimony of numerous witnesses stating that no officers or civilians were in the path of the moving vehicle when Bauer fired his weapon; (4) the bullet holes in the driver's side window and side-door, indicating that the fatal shots were fired by Bauer while he was positioned on the driver's side of the vehicle--even with the driver and out of harm's way--rather than from in front of the vehicle (as he later claimed); and (5) the location of the bullet-entry wound in Hart's back, indicating that Bauer was actually positioned well behind Hart--and not in front of the vehicle--when he fired his service revolver.

Saucier clearly states that the "threshold" question for purposes of qualified immunity is whether "[t]aken in the light most favorable to the party asserting the injury, *do the facts alleged show the officer's conduct violated a constitutional right*?" 533 U.S. at 201, 121 S.Ct. at 2156 (emphasis supplied). Despite *Saucier*'s clear mandate, the Eleventh Circuit cast aside conflicting evidence and viewed the alleged facts in the light most favorable to the defendant officers. By crediting the officers' evidence at the expense of Petitioners' conflicting evidence, the Eleventh Circuit paid mere lip service

to the "threshold" question enunciated in *Saucier*. *See, e.g.*, *Carr*, 337 F.2d at 1226-27 (stating that it "would do violence to *Saucier*" to view the evidence in the light most favorable to the defendant police officers).

Viewing the facts in the light most favorable to Petitioners, as is required under *Saucier*, the facts alleged by Petitioners establish that Bauer and Gooding committed a Fourth Amendment violation. The Fourth Amendment protects individuals from "unreasonable" seizures, and, in *Tennessee v. Garner*, this Court held that it is a violation of the Fourth Amendment for a law enforcement officer to use deadly force to seize a fleeing suspect who is unarmed, nondangerous and does not pose an immediate threat of harm to the officer or others. 475 U.S. at 11-12, 105 S.Ct. at 1701 ("[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . ").

Applying *Garner* to this case, the use of deadly force by Bauer and Gooding was in contravention of Petitioners' Fourth Amendment rights in light of the following evidence: (1) Hart's vehicle was still in the front yard, as opposed to a public roadway or street, when the two officers fired their weapons; (2) the occupants of the vehicle were unarmed; (3) the vehicle was "maneuvering away" from Gooding when he fired his weapon; (4) Gooding shot at the vehicle solely to prevent a prolonged flight, and not because of any imminent threat; (5) Bauer conceded that he fired his weapon solely out of concern for his own safety, yet the front of the vehicle had already passed him when he fired his weapon; (6) the bullet entered Hart through his back, suggesting that Bauer fired from behind the vehicle; (7) there were no other officers within 20 feet of the vehicle; and (8) there were no civilians in the immediate vicinity due to the presence of roadblocks. Under these facts, which must be accepted as true for

purposes of *Saucier*, a jury could easily conclude that Bauer and Gooding violated Petitioners' Fourth Amendment rights.

VI.

This Court's Decision In *Tennessee v. Garner* Provides Fair Notice That It Is A Violation Of The Fourth Amendment To Use Deadly Force Against An Unarmed Suspect Fleeing In An Automobile Where The Suspect Poses No Immediate Threat Of Serious Harm To The Officer Or Others.

The Eleventh Circuit's opinion does not address the second prong of *Saucier*--whether the alleged constitutional right was "clearly established" at the time of the subject incident. The District Court, however, did specifically address that issue and held that this Court's decision in *Garner* "did not give Gooding and Bauer fair warning that shooting at the fleeing vehicle and its driver under these circumstances would clearly violate federal law." (App. 54a).[4] Since the entry of the District Court's order, however, this Court decided *Brosseau* and stated that while *Garner* is cast "at a high level of generality," 543 U.S. at 199, it is not *per se* unavailable for use in demonstrating that the law was "clearly established" merely because an automobile is involved.[5] Rather, as this Court expressly acknowledged in its *Brosseau* opinion, *Garner* can still apply in an "*obvious* case," even where "novel factual circumstances" are involved. *Id.* (citing *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S.Ct. 2508 (2002)).

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[4] In *Garner*, this Court held that it is a violation of the Fourth Amendment for a law enforcement officer to use deadly force to seize a fleeing suspect who is unarmed, nondangerous, and does not pose an immediate threat of harm to the officer or others. 471 U.S. at 11, 105 S.Ct. at 1701.

[5] To hold otherwise would essentially limit the Supreme Court's holding in *Garner* to cases where the suspect flees "on foot." *Garner* contains no such limitation, and there is no basis for creating such a distinction.

In the vehicular context, an "obvious case" permitting *Garner*'s use would be one where the fleeing suspect did not pose an immediate threat of death or serious harm to the officer or others. *See Brosseau*, 543 U.S. at 200. 125 S.Ct. at 600 ("[t]he parties point us to only a handful of cases relevant to the 'situation [Brosseau] confronted': whether to shoot a disturbed felon set on avoiding capture through vehicular flight, when persons in the *immediate* area are at risk from that flight.") (emphasis supplied). *See also Harris v. Coweta County, Ga.*, 433 F.3d 807, 819 & n.5 (11th Cir. 2005) (holding in the context of a high-speed vehicular pursuit that "[w]ithout the existence of an *immediate* threat of harm to the officers or others that could justify the officer's probable cause, the *Garner* rule prohibiting deadly force may apply with 'obvious clarity.'") (emphasis supplied); *Vaughan*, 343 F.3d at 1332-33 ("appl[ying] *Garner* in a common-sense way" to hold that a reasonable officer would have known that it was unconstitutional to use deadly force during a high-speed pursuit where the suspect posed no immediate threat of harm to the police officer or others).

Brosseau did not present such a factual scenario, as this Court characterized it as offering "far from the obvious [case] where *Graham* and *Garner* alone offer a basis for decision." 543 U.S. at 199, 125 S.Ct. at 500. In *Brosseau*, the officer believed that the suspect had a gun and had probable cause to believe that the suspect posed an imminent threat of serious physical harm to several officers and citizens in the immediate surrounding area (including a woman and her three-year-old child parked in a small car only four feet away from the suspect's vehicle, and two men in a parked car nearby). 543 U.S. at 196-97, 125 S.Ct. at 597-98. In addition, the *Brosseau* Court noted that the suspect [Haugen] had pleaded guilty to a felony resulting from his attempted flight from the scene. *Id.*, 543 U.S. at 197, 125 S.Ct. at 598 ("By so pleading, he admitted that he drove his jeep in a manner indicating a 'wanton or willful disregard for the lives of . . . others.'").

Here, by contrast, there is no comparable evidence that Bauer or Gooding had probable cause to believe that Hart posed an immediate risk of death or serious bodily harm to any officer or civilian. Whereas *Brosseau* involved several civilians (including a woman and her three-year-old child) within several feet of the suspect's vehicle, there were *no* civilians in the immediate surrounding area in this case because of the police roadblocks that had been set up outside the residence. Further, numerous witnesses testified that no officer or civilian was in the path of, or otherwise endangered by, Hart's vehicle at the time Bauer applied deadly force. According to Bauer, no officer was within 20 feet of the vehicle when he shot Hart. In addition, all three occupants of the vehicle were unarmed. Further, in contrast to *Brosseau*, the driver in this case (Hart) did not plead guilty to a felony or any other crime arising out of his attempted flight; instead, he was executed by the officers right on the spot. The fact that this case is very different from *Brosseau* permits the conclusion that *Garner*, by itself, clearly establishes the right at issue here. Thus, the District Court's decision is at odds with *Brosseau*.

VII.

The District Court's Dismissal of Petitioners' § 1983 "Municipal Liability" Claims Conflicts With The Principles Recognized in Nearly Every Circuit.

The Eleventh Circuit's opinion did not address Petitioners' claims of "municipal liability" under § 1983. The District Court, however, did address them in its opinion, and dismissed Petitioners' claims of § 1983 municipal liability predicated upon the following theories: (1) persistent failure to discipline, (2) ratification, and (3) failure to train.

A. "Failure to Discipline" Claim

In rejecting Petitioners' "failure to discipline" claim, the District Court placed undue emphasis on the fact that Gooding and Bauer were exonerated by the Sheriff's own investigators, and were not charged criminally by outside law enforcement agencies. (App. 68a-72a). Notably, the District Court did not address the Sheriff's persistent failure to take disciplinary action in other officer-involved shooting incidents, limiting its analysis only to the investigation of this particular incident. Because of its overly narrow focus, the District Court ignored compelling evidence from other similar investigations--spanning a ten-year period---which revealed the Sheriff's deeply flawed "accountability" system.

It is well-settled that a persistent failure to take disciplinary action against officers can give a rise to a "policy" or "custom" for which § 1983 municipal liability can attach within the meaning of *Monell*.[6] At least nine circuit courts of appeal have held that municipal liability may be imposed based on a "failure to discipline" police officers. *See, e.g.*, *Batista v. Rodriguez*, 702 F.2d 393 (2d Cir. 1983); *Colbin v. Upper Darby Township*, 838 F.2d 663, 672 (2d Cir. 1988); *Spell v. McDaniel*, 824 F.2d 1380, 1392 (4th Cir. 1987); *McKenna v. City of Memphis*, 785 F.2d 560, 561 (6th Cir. 1986); *Jones v. City of Chicago*, 787 F.2d 200, 207 (7th Cir. 1986); *Harris v. City of Pagedale*, 821 F.2d 499, 501-07 (8th Cir. 1987); *Fundiller v. City of Cooper City*, 777 F.2d 1436, 1443 (11th Cir. 1992); *Parker v. District of Columbia*, 850 F.2d 708, 712 (D.C. Cir. 1988). The dangers of such a municipal custom cannot be overstated. It creates a system in which an officer's use of deadly force against a civilian will

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[6] *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978) (declaring that municipality can be held liable under § 1983 if the plaintiff shows that a "policy" or "custom" of the municipality was the moving force behind the constitutional deprivation).

almost always be automatically upheld regardless of the facts and circumstances of the particular incident. Such a custom is tantamount to a "tacit authorization" of police misconduct.

The disciplinary apparatus of the Sarasota County Sheriff's Office evinced a complete lack of police officer accountability. Sheriff Monge admitted in his deposition that of the 20 to 30 officer-involved shooting incidents that occurred during his fifteen-year tenure as the Sarasota County Sheriff, *none* resulted in a finding of an "improper" or "excessive" use of force. Likewise, Lieutenant Kenneth Crepeau, who was in charge of the Internal Affairs division of the Sheriff's Office, confirmed that "no complaint found to have merit was made against [any] Sarasota County Sheriff's deputy from 1992 to September 30, 1999" which involved the use of deadly force with a firearm or motor vehicle.

The District Court's Order makes no mention of the lax disciplinary history of the Sheriff's Office, instead limiting its inquiry to how this particular incident was investigated. Such a narrow focus ignores the view espoused by a majority of circuits that "a *persistent* failure to discipline" police officers can give rise to an inference that a municipality has ratified conduct, thereby establishing a "custom" within the meaning of *Monell*. *See Batista*, 702 F.2d at 397; *Fundiller*, 777 F.2d at 1443. Thus, in assessing Petitioners' "failure to discipline" theory of municipality liability, the District Court was necessarily required to consider evidence of the Sheriff's other prior investigations.

Indeed, numerous courts, in denying a municipality's motion for summary judgment on a "failure to discipline" claim, have pointed to the poor disciplinary track record of the municipality. *See, e.g.*, *Samples v. City of Atlanta, Ga.*, 846 F.2d 1328, 1333 (11th Cir. 1988) (denying city's motion for summary judgment based on evidence that "an extremely low percentage" of excessive force claims filed against the

police were sustained); *Fiacco v. City of Rensselaer*, 783 F.2d 319, 328 (2d Cir. 1986) ("Whether or not the claims had validity, the very assertion of a number of such claims put the City on notice that there was a possibility that its police officers had used excessive force."); *McCray v. City of Dothan*, 169 F.Supp.2d 1260, 1284 (M.D. Ala. 2001) (evidence that, in the ten years preceding incident, only one out of twenty-nine excessive force complaints were found to have merit deemed sufficient to withstand city's motion for summary judgment), *aff'd in part, reversed in part* (11th Cir. 2003); *Kindle v. City of Harvey*, 2002 WL 230779, *3 (N.D. Ill. 2002) (denying city's motion for summary judgment based on evidence that in five years preceding the incident, no complaints alleging excessive force were sustained).

Based on the fact that there have been approximately 20-30 shooting incident investigations since 1989, and not one of them has resulted in a finding of excessive force or even minor discipline imposed against the officer involved, it can reasonably be inferred that the Sheriff had a policy and custom of ignoring excessive force violations. *See Robinson v. City of Harvey*, 2001 U.S. Dist. LEXIS 1930, *18-25 (N.D. Ill. 2001) (denying city's motion for summary judgment based on absence of discipline in past incidents; the court held that "the fact that 24 investigations of excessive force complaints filed between 1995 and 1997 resulted in no discipline could lead a factfinder to the conclusion that the City had a policy of ignoring excessive force violations.").

B. "Failure to Train" Claim

In rejecting Petitioners' "failure to train" theory of §1983 municipal liability, the District Court concluded that the deadly force training provided to SWAT officers by the Sheriff's Department was "adequate." (App. 76a). However, this conclusion is at odds with the testimony of no fewer than six Sarasota County law enforcement officers, including

Bauer and Gooding, all of whom admitted that the Sheriff did not provide *any* training to its officers regarding the use and limitations of deadly force during motor vehicle pursuits.

Under similar circumstances, courts have held that a municipality's failure to provide training in the use and limitations of deadly force, especially as it pertains to moving vehicle pursuits, constitutes the requisite "deliberate indifference" to subject the municipality to liability. *See, e.g.*, *Kibbe v. Thurston*, 777 F.2d 801, 806-09 (1st Cir. 1985) (jury could reasonably conclude that municipality's failure to train officers in how to conduct high-speed chases constituted "deliberate indifference"); *Cooper v. Merrill*, 736 F. Supp. 552, 566-69 (D. Del. 1990) (denying municipality's motion for summary judgment where plaintiff adduced evidence that officers received no training in shooting at moving vehicles); *Frye v. Town of Akron*, 759 F. Supp. 1320, 1325 (N.D. Ind. 1991) (failure to train officers on subject of high-speed pursuits can be characterized as "deliberate indifference").

For example, in *Cooper*, the plaintiff argued that a municipality provided no training to its officers regarding the use of deadly force during vehicular pursuits. In support of his contention, plaintiff relied on a single officer's testimony that he had not received any training in shooting at moving vehicles. The Court concluded that this evidence presented a genuine issue of material fact as to plaintiff's failure to train claim, and thus denied the municipality's motion for summary judgment, explaining:

> [t]here is a genuine dispute between the parties regarding the existence of any adequate training. [Officer] Magaw testified that [the municipality's] officers participated in a number of pursuits, but there was no policy, procedure or training regarding such

> situations. . . . The Court therefore concludes that summary judgment is not appropriate.

736 F. Supp. at 568.

Likewise, in *Kibbe*, plaintiff, the legal representative of a decedent who was shot and killed by police during a vehicular pursuit, brought a "failure to train" claim against a municipality, arguing that the municipality provided virtually no training to its officers in apprehending suspects fleeing in a vehicle. The case was tried to a jury, and the jury found for the plaintiff. The First Circuit affirmed the trial court's denial of the municipality's motion for judgment notwithstanding the verdict, concluding that there was sufficient evidence of the city's failure to train its officers in the use of deadly force during motor vehicle pursuits to support the jury's finding:

> Although evidence on the [municipality's] training practices was sparse, the testimony of two officers indicated that the [municipality] gave officers virtually no guidance in apprehending suspects fleeing in motor vehicles who ignored orders to stop. . . .

777 F.2d at 807-08.

Here, Petitioners presented more evidence of the lack of training than plaintiffs adduced in either *Cooper* or *Kibbe*. Rather than relying on the testimony of just one or two officers, Petitioners cited the deposition testimony of no less than six law enforcement officers, including Bauer, Gooding, several training instructors, and the Sheriff himself. Such testimony was more than sufficient to create a genuine issue of material fact regarding the adequacy of the SWAT officers' training.

Since this was a motion for summary judgment, and there is conflicting evidence, the District Court should not have credited the self-serving affidavit testimony cited by the Sheriff over the contradictory evidence supplied by Petitioners. At this stage of the proceedings, all inferences and reasonable doubts about the facts should have been resolved in Petitioners' favor.

CONCLUSION

For all of the foregoing reasons, Petitioners Dianne Troupe and Leon Waiters, Jr. respectfully request that the Supreme Court of the United States grant their petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

[DATED AND DECIDED ON AUGUST 3, 2005]

No. 04-10550

D. C. Docket No. 02-00053-CV-T-24-MAP

DIANNE TROUPE, as Personal Representative, for the Estate of Ricardo Robinson, deceased,

Plaintiff-Appellant-
Cross-Appellee,

versus

SARASOTA COUNTY, FLORIDA, a Florida municipal corporation and a political subdivision of the State of Florida, GEOFFREY MONGE, individually and in his official capacity as the former Sheriff of Sarasota County, Florida, et al.,

Defendants-Appellees,

WILLIAM F. BALKWILL, in his official capacity as the Sheriff of Sarasota County, Florida, KEVIN L. GOODING, individually and in his official capacity as a Sarasota County, Florida Deputy Sheriff, TIMOTHY L. BAUER, individually and in his official capacity as a Sarasota County, Florida Deputy Sheriff,

Defendants-Appellees-
Cross-Appellants.

No. 04-10563

D.C. Docket No. 02-00054-CV-T-24-MAP

LEON WAITERS, JR.,

Plaintiff-Appellant-
Cross-Appellee,

versus

SARASOTA COUNTY, FLORIDA, a Florida municipal corporation and a political subdivision of the State of Florida, GEOFFREY MONGE, individually and in his official capacity as the former Sheriff of Sarasota County, Florida, SARASOTA COUNTY SHERIFF'S DEPARTMENT, a political subdivision of the State of Florida,

Defendants-Appellees,

WILLIAM F. BALKWILL, in his official capacity as the Sheriff of Sarasota County, Florida, KEVIN L. GOODING, individually and in his official capacity as a Sarasota County, Florida Deputy Sheriff, TIMOTHY L. BAUER, individually and in his official capacity as a Sarasota County, Florida Deputy Sheriff,

Defendants-Appellees-
Cross-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

(August 3, 2005)

Before TJOFLAT and KRAVITCH, Circuit Judges and LIMBAUGH* District Judge,

KRAVITCH, Circuit Judge:

In two cases, consolidated on appeal, Plaintiff-Appellant Dianne Troupe, as personal representative for the estate of Ricardo Robinson, deceased, and Plaintiff-Appellant, Leon Waiters, Jr. (collectively "the plaintiffs") appeal the district court's grant of summary judgment in favor of Sarasota County, Sheriff Geoffrey Monge, Sheriff William F. Balkwill, Deputy Kevin L. Gooding, and Deputy Timothy L. Bauer (collectively "the defendants") in their 42 U.S.C. § 1983 action based on alleged excessive force by police officers.

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*Honorable Stephen N, Limbaugh, United States District Judge for the Eastern District of Missouri, sitting by designation

I. Facts

On the morning of September 30, 1999, the Sarasota County Sheriffs Office Special Weapons and Tactics ("SWAT") Team prepared to serve a felony drug arrest warrant for Ryan Hart ("Hart") and a search warrant for Hart's residence located at 2459 Bahia Vista, Sarasota, Florida ("the residence"). Defendant Captain Kevin L. Gooding ("Gooding") was the leader of the SWAT Team. Sixteen other SWAT members, including Defendant Timothy L. Bauer ("Bauer"), reported for the scheduled briefing.

The Special Investigation Bureau ("SIB") detectives working with the FBI violent crimes task force went over information about Hart. The SWAT Team was told that Hart was a 27-year old male with 40 previous arrests and 19 convictions. They were informed that Hart was out on bond for attempted murder and was known to run from the police and for his violent tendencies. Gooding then briefed the Team on the tactical plan for executing the warrants and gave out individual assignments. The Team, dressed in full

SWAT gear, then moved to an area near Hart's home to prepare for the execution of the warrants. The surrounding streets near the residence were blocked off by Sarasota County law enforcement personnel.

A surveillance report issued while the team was en route indicated that Hart and two other males-later identified as Robinson and Waiters-had exited the house and were approaching a four door black Oldsmobile ("the Oldsmobile") parked in the driveway. Gooding and the driver of the SWAT Team van drove their vehicles into positions blocking the Oldsmobile's exit from the driveway. Hart and the two men entered the car and locked the doors.

The SWAT Team, with their guns drawn, surrounded the Oldsmobile, and yelled commands for Hart and the passengers to open the doors and surrender. Gooding attempted to open the driver's door and another Deputy attempted to open the front passenger door, but both doors remained locked. The other officers continued to yell commands such as "Sheriffs department, hands up, hands

up, get out of the vehicle," but none of the passengers complied. The Oldsmobile then began to move, with Hart as the driver, revving the engine loudly and the car jerking backwards and forwards.

When the incident occurred, Regina Weatherington ("Weatherington"), a cable splicer for Verizon, was working up approximately 25 feet high on a telephone pole located across the street. She had a clear view of the entire incident. Weatherington's testimony indicates that "the car would move fast-quickly, and stop quickly, and move fast again. Stopping quickly," She testified that the uniformed "policemen had the car surrounded with their bodies" and that she was surprised that no one got hit.[1]

Gooding claimed that he heard a change in the tone of the SWAT Team members' voices as the Oldsmobile moved, "like they were in extreme danger where they were." He stated that he "felt a very pressing need at that

moment in time to cause that driver to stop doing what he was doing with that car" because his officers were in serious danger and "at risk for loss of life and limb." Thus, he raised his weapon, but did not shoot the driver because he felt he might harm other SWAT Team members who were in the line of fire. Suddenly, the Oldsmobile made a hard left such that the car was now facing the road. Gooding, believing that he had an opportunity to "disable the car," fired a single shot at a low angle, aiming for the lower portion of the tire. The shot missed the tire and, apparently, did not strike anyone or anything.

Soon thereafter, Bauer saw the car coming directly at him and believed it would run right through him in order to leave the scene. He aimed his weapon and fired two shots at the driver of the Oldsmobile and jumped out of the way as the car swept past him. One bullet struck the driver's door

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[1] The plaintiffs contend that Hart did not hit any of the officers in the struggle. Corporal Mike Kennedy claims that his foot was run over by the rear tire and Deputy Randall Butsch claims that the car struck him in the left leg.

just above the keyhole. The other bullet went through the driver's side window and hit Hart in the back.[2]

Hart then accelerated the car out of the yard, made a left turn onto Bahia Vista, and headed west for over 0.3 miles. The Oldsmobile maneuvered through the intersection of Shade and Bahia Vista without slowing. It then approached an officer's unmarked vehicle, slowed down, made a sharp move to the right to avoid oncoming traffic from the left, and went onto the grass and sidewalk, crashing into a concrete wall. Hart was pronounced dead at the scene. Robinson, the front seat passenger, was also pronounced dead at the scene. The backseat passenger, Waiters, sustained blunt force trauma injuries to the skull, and was transported via helicopter to a hospital for emergency medical treatment.[3]

After the completion of internal investigations which exonerated the officers from any wrongdoing, the plaintiffs

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[2] None of the shots hit either Robinson or Waiters.

[3] Waiters remained in a coma for two and a half months following the incident

filed suit in Florida State court. The defendants subsequently removed the case to federal district court. Pursuant to § 1983, the plaintiffs alleged: Excessive Force by Defendants Gooding and Bauer (Count I); Failure to Protect Decedent from Unconstitutional Harm by Defendants Gooding and Bauer (Count II); Supervisory Liability by Defendant Gooding (Count III); and Municipal Liability by Defendant Sarasota County and Defendant Sheriff Balkwill (Count IV).[4] Each defendant moved for summary judgment. The district court granted summary judgment on all counts.

In this appeal, we address whether the district court erred in finding that (1) the defendants were not the proximate cause of the plaintiffs' injuries; (2) the

[4] The plaintiffs also asserted several state law claims. Because the district court dismissed plaintiffs' federal law claims in their entirety, the district court declined to exercise supplemental jurisdiction over plaintiffs' state law claims. The state law claims were remanded to state court and thus are not at issue on appeal.

defendants' use of deadly force was reasonable under §1983; and (3) the defendants were entitled to qualified immunity.[5]

II. Discussion

A. Standard of Review

We review the district court's grant of summary judgment de novo applying the same standard as the district court. *Korman v. HBC Fla., Inc.*, 182 F..3d 1291, 1293 (11th Cir. 1999). We draw all inferences in favor of the non moving party. *Id. See also Robinson v, Arrugueta*, No. 04-10856 *2 (11th Cir. 2005).

B. The Defendants Were Not the "Proximate Cause" of the Plaintiffs' Injuries.

A § 1983 claim requires proof of an affirmative causal connection between the defendant's acts or omissions and the alleged constitutional deprivation. *Zatler v. Wainwright*, 802 F.2d 397, 401 (11th Cir. 1986), Recovery of damages is limited to those injuries proved to be caused by

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[5] We affirm, without discussion, the judgment of the district court with regard to the remaining issues on appeal. *See* 11th Circuit Rule 36-1, Thus, we conclude that (1) Gooding was not liable under § 1983 for supervisor liability; and (2) the Sheriff was not liable under § 1983 for municipal liability.

the defendants. *See Whiting v. Traylor*, 85 F.3d 581, 586 n.10 (11th Cir. 1996) (holding in a malicious-prosecution case against arresting officers that the chain of causation could be broken by the prosecutor). The district court concluded that Bauer and Gooding were not the proximate cause of the plaintiffs' injuries because it determined that Hart's continued flight after being shot by Bauer constituted an independent "intervening" cause.

For the following reasons, we conclude that the district court did not err in making this determination. First, Gooding fired only one shot and it completely missed striking the car or any of its passengers. Thus, Gooding's single-missed shot was not the proximate cause of any injury to Robinson and Waiters. Hart's decision to continue his flight and his continued exercise of control over the Oldsmobile after he was shot,[6] "was the intervening cause"

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6 Specifically, Gooding points to the following evidence for support that Hart exerted control over the Oldsmobile after he was shot:

> (1) Hart drove the vehicle out of the yard onto Bahia Vista Street overshooting the westbound lane, going into the eastbound lane, then quickly turning back into the westbound lane; (2) As Hart

of Robinson and Waiters' injuries. The fact that Hart ultimately died from the gunshot wound fired by Bauer does not erase the acts and decisions that Hart made after the shooting and up to the time of his death." The causal relation does not exist when the continuum between Defendant's action and the ultimate harm is occupied by the conduct of deliberative and autonomous decision-makers." *Dixon v. Burke County,* 303 F.3d 1271, 1275 (11th Cir. 2002). Hart began implementation of his escape before deadly force was applied. His reckless driving preceded any shots, continued as shots were taken, and continued after the shots were fired. Thus, Hart's determination to flee was not

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drove west on Bahia Vista he rapidly accelerated his car to a speed of 60 to 70 MPH; (3) As the Oldsmobile approached the slower traveling unmarked car of Detective Wallace also in the westbound lane of Bahia Vista, the brake lights of the Oldsmobile came on and the Oldsmobile slowed down; (4) The Oldsmobile initially attempted to go around Detective Wallace's car on the left but was blocked by eastbound traffic. The Oldsmobile then made a sharp turn to the right back into the westbound lane; (5) The Oldsmobile then moved to the right of Wallace's vehicle going up on the sidewalk and hitting a concrete wall and then a concrete pole. Just prior to impact, Wallace saw the car's wheels turn "Like somebody was trying to get back into Bahia Vista" and Deputy Shaw observed the car make a sudden movement to the left and the vehicle's brake lights come on just before impact before impact.

a reaction to the force used by Bauer or the other Officers. Instead, Hart's behavior prior to the shots establishes that he had no intention to drive safely regardless of whether shots were fired. Thus, the district court did not err in concluding that it was Hart's reckless driving that caused the death and injury of the plaintiffs and not Bauer's decision to use deadly force.

C. The District Court Erred in Finding A Fourth Amendment Seizure of Robinson and Waiters.

The plaintiffs allege that Gooding and Bauer used excessive force in violation of their Fourth Amendment right to be free from unreasonable searches and seizures. To assert a Fourth Amendment claim based on the use of excessive force, the plaintiffs must allege (1) that a seizure occurred and (2) that the force used to effect the seizure was unreasonable. *See Evans v. Hightower*, 117 F.3d 1318, 1320 (11th Cir. 1997). The district court found that a Fourth Amendment seizure of Robinson and Waiters occurred when

"Gooding fired at the Oldsmobile and Bauer fired at Hart in an attempt to stop the car." We disagree.

"[A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement. . . nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual's freedom of movement. . . but only when there is a governmental termination of freedom of movement through *means intentionally applied*." *Brower v. County of Inyo*, 489 U.S. 593, 596-97, 109 S.Ct. 1378, 1381, 103 L,Ed.2d 628 (1989) (emphasis in original). "It is intervention directed at a specific individual that furnishes the basis for a Fourth Amendment claim." *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 796 (1st Cir. 1990).

Force regardless of the form directed to a driver of a vehicle-particularly one attempting to flee-does not give rise to a due process deprivation claim unless it was exercised with "a purpose to cause harm" unrelated to the legitimate object of arrest. *Id.* The plaintiffs concede that shots were

fired at the driver as he "began to drive parallel to the residence proceeding out of the circular driveway" in an "attempt to stop [the car] from leaving the residence." The plaintiffs do not allege that Gooding or Bauer had the intent to cause harm unrelated to the arrest.

Furthermore, Gooding's attempt to seize Hart by firing at the tire of the Oldsmobile was not a seizure. "[N]either usage nor common-law tradition makes an *attempted* seizure a seizure." *California v. Hodari D.*, 499 U.S. 621, 626 n.2, 111 S.Ct. 1547, 1551 n,2, 113 L.Ed.2d 690 (1991) (emphasis in original). Additionally, stopping a vehicle's driver does not constitute a seizure of a passenger. *See County of Sacramento v. Lewis*, 523 U.S. 833, 844, 118 S.Ct. 1708, 1715, 140 L.Ed.2d 1043 (1998), *citing Brower*, 489 U.S. at 596-97. Thus, when Bauer shot Hart that did not constitute a seizure of the passengers. Therefore, the district court erred when it found that Gooding and Bauer seized the occupants of the vehicle.

Nonetheless, we note that although the district court found that a seizure occurred it also found that the force used to effect the seizure was reasonable. Thus, though we disagree that a seizure occurred, we agree with the district court's final assessment that the plaintiffs did not establish an excessive force claim.

D. The Defendants were Entitled to Qualified Immunity.

Even if Gooding and Bauer had seized Robinson and Waiters with unreasonable use of force, the district court correctly found that they were entitled to qualified immunity, In *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001), the Supreme Court set out a two-step analysis to determine whether an officer is eligible for qualified immunity. The first step is to determine whether the facts "[t]aken in the light most favorable to the party asserting the injury,... show the officer's conduct violated a constitutional right[.]" *Id.* If the conduct did not violate a constitutional right, the inquiry ends there. If the conduct violated a constitutional right, a court must move on to the

second step and determine "whether the right was clearly established." *Id. See also Robinson*, No. 04-10856 *2.

The Fourth Amendment protects individuals from 'unreasonable" seizures. As we recently explained in *Robinson*,

> Deadly force is "reasonable" for the purposes of the Fourth Amendment when an officer "(1) 'has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others' or 'that he has committed a crime involving the infliction or threatened infliction of serious physical harm'; (2) reasonably believes that the use of deadly force was necessary to prevent escape; and (3) has given some warning about the possible use of deadly force; if feasible." *Vaughan v. Cox*, 343 F.3d 1323, 1329-30 (11th Cir. 2003)[7] (quoting *Tennessee v. Garner*, 47 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)); *see also Crosby v. Monroe County*, 394 F.3d 1328, 1333 (11th Cir. 2004) ("the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting him, without regard to his underlying intent or motivation.").

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[7] In *Vaughan*, this Court held that a reasonable jury could conclude that an officer used excessive force against a passenger in a moving vehicle when there was evidence that the driver led police on a high-speed chase at speeds approaching 90 MPH and when there was a factual question of whether the suspect made any motion in the direction of hitting the officer or putting other lives in danger.

Robinson, No. 04-10856 *2.

The district court determined that the force Gooding and Bauer used under the circumstances was reasonable. The court found that if Hart's escape had been successful, his path of flight "could have posed" a threat of death or serious injury to the public or to other members of the SWAT Team. The plaintiffs argue that the mere possibility that others may be harmed is not enough to justify the use of deadly force, asserting that there must be an immediate and justifiable threat of harm. *See Graham v. Connor*, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989). The plaintiffs contend that numerous witnesses testified that no law enforcement officer or civilian was in the path of the Oldsmobile when the shots were fired.

Although the facts must be taken in the light most favorable to the plaintiffs, the determination of reasonableness must be made from the perspective of the officer:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation,

Menuel v. City of Atlanta, 25 F.3d 990, 996 (11th Cir. 1994), quoting Graham, 490 U.S. at 396-97.

Here, the SWAT Team surrounded the Oldsmobile, and Hart was disobeying their clear orders to put his hands up and surrender. The Oldsmobile suddenly moved forward and backward and the Officers had to make split-second decisions of whether they could escape before anyone suffered serious injury. In their briefing earlier, they were told that Hart was dangerous and had tried to escape from police before and would likely be carrying a weapon. Additionally, the three officers surrounding Hart's car, and a fourth in the yard all separately concluded that deadly force was needed and appropriate to stop Hart, but they did

not shoot because they did not have a clear shot and were worried about a cross-fire situation. Bauer was directly in Hart's path as the Oldsmobile accelerated toward him. He had only 3-5 seconds to assess the situation before shooting. Even if in hindsight the facts show that the SWAT Team could have escaped unharmed, a reasonable officer could have perceived that Hart posed a threat of serious physical harm.

In *Brosseau v. Haugen*, - U.S. - 125 S.Ct. 596, 600, 160 L.Ed.2d 583 (2004), the Supreme Court held that it was objectively reasonable for Officer Brosseau to use deadly force against a suspect in an attempt to prevent the suspect's escape and potential harm to others. In *Brosseau*, like the present case, the Officer fired through the driver's side window and the bullet entered the driver's back. 125 S.Ct. at 598. Here, Gooding and Bauer perceived that Hart was attempting to escape and could potentially endanger more lives and thus, Bauer shot through the driver's side window and hit Hart in the back. Because the *Brosseau* Court held

that it is constitutionally reasonable for an officer to use deadly force when a suspect is threatening to escape and cause harm to others, and because of the similarities of these two cases,[8] the district court did not err in finding that the officers' conduct did not violate a constitutional right and that Gooding and Bauer were entitled to qualified immunity.[9] Finally, because our inquiry ends at the first step,

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[8] In *Brosseau,* citizens and other officers were in the immediate area and were at a high risk of harm if the suspect had escaped. *Id.* In the present case, the streets were blocked, which created less possibility of harm to innocent citizens. Nonetheless, the Oldsmobile was surrounded by Officers who were at risk and the car did end up breaking out of the driveway and getting onto a main road. Bauer was aware at the time of the shooting that other surveillance officers were only a short distance away. He also knew that citizens could be on the main street and could be harmed. Thus, Bauer believed there was an immediate risk of harm to the general public.

[9] We note that this case is distinguishable from *Harris v. Coweta County,* 406 F.3d 1307 (11th Cir. 2005). Under the first prong of the *Saucier* analysis, the *Harris* panel concluded that Harris was seized by Scott, a ticketing officer, when Scott rammed his vehicle into Harris's vehicle and that the use of deadly force was unreasonable. *Id.* At 1315-17. The Court stressed that "Scott did not have probable cause to believe that Harris had committed a crime involving the infliction or threatened infliction of serious physical harm, nor did Harris, prior to the chase pose an imminent threat of serious physical harm to Scott or others." *Id.* at 1316. Harris's only crime was speeding. *Id.* In contrast, Hart, in the case *sub judice*, had 40 previous arrests and 19 convictions. The officers were informed that Hart was out on bond for attempted murder and was known to run from the police and for his violent tendencies. Hart bumped his car into one officer before the shooting and ran over the foot of another. Thus, these cases are distinguishable

we need not determine whether the law was clearly established at the time of the incident. *Saucier*, 533 U.S. at 201.

III. CONCLUSION

For the reasons stated above, we conclude that the district court did not err in granting summary judgment in favor of the defendants.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

[FILED ON JANUARY 22, 2004]

DIANE TROUPE, as Personal Representative for the Estate of Ricardo Robinson, deceased,

Plaintiff,

Case No. 8:02-cv-53-T-24MAP

v.

SARASOTA COUNTY, FLORIDA, WILLIAM F. BALKWILL, KEVIN L. GOODING, and TIMOTHY L. BAUER,

Defendants.

ORDER

This cause comes before the Court on the following motions: Defendant Sarasota County's ("the County") Motion for Summary Judgment (Doc. No. 123); Defendant William F. Balkwill's ("Balkwill") Motion for Summary Judgment (Doc. No. 125); Defendant Timothy L. Bauer's Motion for Summary Judgment (Doc. No. 128); and Defendant Kevin L. Gooding's

Motion for Summary Judgment (Doc. No. 131). Plaintiff has filed responses in opposition to each of these motions for summary judgment.

I. Factual Background

On September 29, 1999, the Sarasota County Sheriff's Office ("SCSO") obtained three felony arrest warrants for Ryan Hart ("Hart") and a search warrant for Hart's residence located at 2459 Bahia Vista, Sarasota, Florida ("the residence"), including people found therein, the curtilage, and cars found therein (Doc. No. 134, Tab 3, Exh. A-D). The SCSO, working in conjunction with a Federal Bureau of Investigation ("FBI") multi-jurisdictional violent crimes task force, identified Hart as a suspect in numerous drug sales (Doc. No. 134, Gooding Dep., p. 9-10). Prior to the issuance of the warrants, Hart had participated in a series of undercover drug transactions (Doc. No. 134, Gooding Dep., p. 7). Because Hart was known to run from the police, was out on bond for attempted murder, and

had shown violent tendencies, the SCSO informed its Special Weapons and Training ("SWAT") team that its services were needed for the service of the warrants (Doc. No. 152, Tab No. 58, Mayer CIB Statement).

On September 30, 1999, the SWAT team of the SCSO prepared to serve the warrants. Defendant Deputy Kevin L. Gooding ("Gooding") led the SWAT team. At the SWAT team briefing, the SCSO Special Investigation Bureau ("SIB") detectives working with the FBI violent crimes task force discussed the objectives of the operation, Hart's criminal background, and his propensity to flee (Doc. No. 134: Bauer Dep., p. 132-35; Butsch Dep., p. 39; Kennedy Dep., p. 19-20; McElyea Dep., p. 21-23). During this first portion of the briefing, the SWAT team members were given photographs of Hart and a copy of Hart's criminal history (Doc. No. 134: Bauer Dep., p. 132; Butsch Dep., p. 40). The second part of the briefing addressed the tactical plan for executing the warrants

and the individual assignments within that tactical plan (Doc. No. 134, Butsch Dep., p. 41-43). The entire SWAT team briefing lasted approximately 30-45 minutes (Doc. No. 134, Kenney Dep., p. 11). During this briefing, at approximately 10:00 a.m., the SWAT surveillance team reported by radio to Gooding that Hart had left the residence, gotten into a four door black Oldsmobile ("the Oldsmobile") parked outside the residence, and driven away from the residence (Doc. No. 134, Gooding Dep., p. 36). Upon completion of the briefing, the SWAT team members donned their olive green SWAT uniforms and black vests with "SHERIFF" printed in large white letters on the front and back (Doc. No. 134, Tab 2, Kenney Aff.).

Following the briefing, the SWAT surveillance team informed Gooding that the Oldsmobile had returned to the residence. The surveillance team further identified the driver of the Oldsmobile as Hart and reported that Hart and two other

men had exited the Oldsmobile and entered the residence. (Doc. No. 134: Gooding Dep., p. 48-49; Kennedy Dep., p. 32-33; Mercurio Dep., p.12-14). Thereafter, Hart and the same two men[1] again left the residence and got into the Oldsmobile. Hart then started the car (Doc. No. 152: Tab 45, Kennedy CIB Statement; Tab 52, Cox CIB Statement). At the same time, two unmarked vehicles, a Chevrolet Tahoe driven by Gooding and a SWAT van driven by another deputy, arrived at the residence.

Upon reaching the residence, Gooding and the driver of the SWAT van drove their respective vehicles into positions blocking the Oldsmobile's exit from the driveway. Gooding immediately exited his vehicle, ran to the front driver's side of the Oldsmobile, informed the occupants that he had a warrant, and ordered the occupants of the Oldsmobile to exit the vehicle

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[1] Gooding and Bauer claim that they did not know that two passengers, Ricardo Robinson and Leon Waiters, Jr., were in the Oldsmobile with Hart. However, construing the facts in favor of the non-moving party, the Court finds that Gooding and Bauer were aware of Robinson and Waiter's presence.

(Doc. No. 134, Gooding Dep., p. 67). Gooding, still giving verbal commands, attempted to open the driver's door, but the door was locked (Doc. No. 134, Gooding Dep., p. 67-68). Deputy Kevin McElyea unsuccessfully attempted to open the front passenger door (Doc. No. 134, McElyea Dep., p. 50). Other deputies surrounded the Oldsmobile and continued to shout verbal commands at the occupants to get out of the car (Doc. No. 134: Gooding Dep., p. 68; Munch Dep., p. 15; McElyea Dep., p. 44-45). At this point, the Oldsmobile was idle (Doc. No. 134, Butsch Dep., p. 52; Munch Dep., p. 20, 40; Weatherington Dep., p. 49-50). According to an eyewitness, a Verizon employee working on a nearby telephone pole, the deputies surrounding the car were approximately six feet from the car and had their weapons raised (Doc. No. 134, Weatherington Dep., p. 46-47). The Oldsmobile then began to move, and the deputies were "trying to get out of the way" of the car (Doc. No. 134, Weatherington Dep., p. 22). At no point

did the deputies do anything to prevent the occupants of the Oldsmobile from getting out of the car (Doc. No. 134, Weatherington Dep., p. 31).

Next, Hart began to drive the Oldsmobile forwards and backwards in the driveway (Doc. No. 134: Gooding Dep., p. 70-72; McElyea Dep., p. 51-52; Mercurio Dep., p. 18; Kennedy Dep., p. 49-50; Weatherington Dep., p. 18). Deputy Randall Butsch claims that at one point he was struck in the left leg by the bumper of the Oldsmobile (Doc. No. 134, Butsch Dep., p. 59). Deputy Michael Kennedy claims that his foot was run over by the left rear tire of the Oldsmobile as it moved forward from the driveway to the front yard (Doc. No. 134, Kennedy Dep., p. 53-54). While several deputies had to jump out of the way of the Oldsmobile to avoid being hit, Plaintiff argues that no one was actually struck. The Verizon eyewitness was surprised no one was struck "[b]ecause the car would move fast - quickly,

and stop quickly, and move fast again. Stopping quickly." (Doc. No. 134, Weatherington Dep., p. 39).

The Oldsmobile continued to move back and forth and then to the left toward the front of the yard. The deputies, yelling at the driver to stop the car, moved alongside the Oldsmobile as it moved. The Oldsmobile then made a hard left such that the front end of the car faced Bahia Vista (Doc. No. 134: Gooding Dep., p. 74-75; Butsch Dep., p. 62-64). At that point, the Oldsmobile accelerated toward the front of the yard, and Gooding fired a single shot at a low angle, aiming for the lower portion of one of the rear tires (Doc. No. 134, Gooding Dep., p. 82-83.) Gooding's shot missed the tire and apparently did not hit anything (Doc. No. 134, Gooding Dep., p. 82-83.) Soon, thereafter, Defendant Deputy Timothy L. Bauer ("Bauer") fired two shots at the driver of the Oldsmobile as the car was moving past him (Doc. No. 134: Bauer Dep., p. 205-072; Butsch Dep., p. 66). One bullet struck the driver's door

just above the keyhole. The other bullet hit Hart. It is undisputed that none of the three shots hit either of the two passengers in the car.

After the three shots were fired, Hart accelerated out of the yard, made a left turn onto Bahia Vista, and headed west for over 0.3 miles (Doc. No. 134: Weatherington Dep., p. 27; Mercurio Dep., p. 28; Wallace Dep., p. 21; Pollack Dep., p. 28). Once on Bahia Vista, Hart attempted to pass an unmarked SCSO vehicle on the left, but, due to the presence of other vehicles, he had to instead pass the unmarked vehicle on the right by driving onto the grass and sidewalk (Doc. No. 134: Mercurio Dep., p. 52-54; Pollack Dep., p. 31-32; Shaw Dep., p. 27-29). As a result, Hart struck a concrete wall and then struck a concrete pole at the intersection of Shade and Bahia Vista (Doc. No. 134, Wallace Dep., p. 29-30; Mercurio Dep., p. 54-55; Pollack Dep., p. 32; Shaw Dep., p. 27-29). Hart and one of the passengers, Ricardo Robinson ("Robinson"), died at the

scene of the accident. The other passenger, Leon Waiters, Jr., survived, but was in a coma for nearly two and one-half months.

On September 26, 2001, Diane Troupe ("Plaintiff") filed the instant suit on behalf of Robinson in the Twelfth Judicial Circuit in and for Sarasota County, Florida (Doc. No. 2). On January 11, 2002, the defendants collectively removed the case to this Court (Doc. No. 1). On May 1, 2003, Plaintiff filed her Second Amended Complaint in which she alleged the following claims pursuant to 42 U.S.C. §1983: Excessive Force by Defendants Gooding and Bauer (Count I); Failure to Protect Decedent from Unconstitutional Harm by Defendants Gooding and Bauer (Count II); Supervisory Liability by Defendant Gooding (Count III); and Municipal Liability by Defendant Sarasota County and Defendant Sheriff Balkwill (Court IV). In addition to these four federal claims, Plaintiff's Second Amended Complaint contains the following five state claims:

Assault and Battery by Defendants Bauer and Gooding (Count V); Assault and Battery by Defendant Balkwill pursuant to the doctrine of respondeat superior (Count VI); Negligence by Defendants Bauer and Gooding (Count VII); Negligence by Defendant Balkwill pursuant to the doctrine of respondeat superior (Count VIII); and Negligent Hiring, Training and Supervision by Defendant Balkwill (Count IX) (Doc. No. 96, Second Amended Complaint). Each defendant has separately moved for summary judgment.

II. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of showing the Court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial.

See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). A moving party discharges its burden on a motion for summary judgment by "showing" or "pointing out" to the Court that there is an absence of evidence to support the non-moving party's case. Id. at 325. Rule 56 permits the moving party to discharge its burden with or without supporting affidavits and to move for summary judgment on the case as a whole or on any claim. See id. When a moving party has discharged its burden, the non-moving party must then "go beyond the pleadings," and by its own affidavits, or by "depositions, answers to interrogatories, and admissions on file," designate specific facts showing there is a genuine issue for trial. Id. at 324.

In determining whether the moving party has met its burden of establishing that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law, the Court must draw inferences from the evidence in the

light most favorable to the non-movant and resolve all reasonable doubts in that party's favor. See Spence v. Zimmerman, 873 F.2d 256 (11th Cir. 1989); see also Samples on behalf of Samples v. City of Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988). The Eleventh Circuit has explained the reasonableness standard:

> In deciding whether an inference is reasonable, the Court must "cull the universe of possible inferences from the facts established by weighing each against the abstract standard of reasonableness." [citation omitted]. The opposing party's inferences need not be more probable than those inferences in favor of the movant to create a factual dispute, so long as they reasonably may be drawn from the facts. When more than one inference reasonably can be drawn, it is for the trier of fact to determine the proper one.

WSB-TV v. Lee, 842 F.2d 1266, 1270 (11th Cir. 1988).

Thus, if a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant the summary judgment motion. See Augusta Iron & Steel Works v. Employers Ins. of Wausau, 835

F.2d 855, 856 (11th Cir. 1988). A dispute about a material fact is "genuine" if the "evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

III. Motions for Summary Judgment

Four motions for summary judgment have been filed in this case. The County has moved this Court to grant summary judgment in its favor as to Count IV (Doc. Nos. 123). Balkwill seeks summary judgment in his favor as to Counts IV, VI, VIII and IX (Doc. Nos. 125). Bauer has moved this Court to grant summary judgment in his favor as to Counts I, II, V, and VII (Doc. Nos. 128). Gooding seeks summary judgment in his favor as to Counts I, II, III, V, and VII (Doc. Nos. 131). Since each of the these pending motions for summary judgment address

separate counts, the Court will address the motions in the order that those Counts appear in Plaintiff's Second Amended Complaint.

A. § 1983 Claims

1. Count I - Excessive Force of Defendants Gooding and Bauer

Gooding and Bauer move this Court to grant summary judgment in their favor on Plaintiff's claim that they used excessive force in shooting at Hart's moving vehicle.

a. Proximate Causation

As an initial matter, Gooding and Bauer argue that their use of force did not proximately cause Robinson's death. This Court agrees. Causation of damages in a § 1983 action depends on basic principles of tort causation. See Dixon v. Burke County, 303 F.3d 1271, 1275 (11th Cir. 2002). Without causation, Plaintiff's excessive force claim under § 1983 fails as a matter of law. See id. Gooding and Bauer argue that Robinson's death was caused solely by Hart's decision-making

and reckless driving which culminated in the Oldsmobile crashing into a concrete pole. Even construing the facts in the light most favorable to Plaintiff, the Court agrees with Gooding and Bauer that Robinson's death was proximately caused by the actions of Hart and not the actions of Gooding and Bauer.

After being shot by Bauer, Hart drove the Oldsmobile out of the front yard of the residence and made a left turn heading west on Bahia Vista. Once on Bahia Vista, Hart attempted to pass a slow-moving vehicle driven by Detective Richard Wallace, but he had to swerve back to the right to avoid oncoming traffic in the eastbound lane. In trying to pass Wallace's vehicle on the right side, Hart drove the Oldsmobile over the curb and onto the sidewalk where he struck a wall and pole. In total, Hart traveled west on Bahia Vista for over 0.3 miles before hitting the concrete wall and the concrete pole.

It is undisputed that Robinson's death occurred as a result of the Oldsmobile's impact with the concrete pole. The

Court finds, however, that Hart's decision to continue his flight after being shot by Bauer was the intervening cause of Robinson's death. The shots fired by Gooding and Bauer were not the proximate cause of Robinson's death, and, for this reason, judgment should be granted for Gooding and Bauer as to Count I.

b. Excessive Force

However, even assuming that Gooding and Bauer's shots did proximately cause the death of Robinson, the force used was reasonable under the circumstances. "The Fourth Amendment's freedom from unreasonable searches and seizures encompasses the plain right to be free from the use of excessive force in the course of an arrest." Lee v. Ferraro, 284 F.3d 1188, 1197 (11th Cir. 2002) (citation omitted). To assert a Fourth Amendment claim based on the use of excessive force, the plaintiff must allege (1) that a seizure occurred and (2) that the force used to effect the seizure was unreasonable. See Evans v.

Hightower, 117 F.3d 1318, 1320 (11th Cir. 1997) (citation omitted).

i. Seizure

A seizure occurs "when there is a governmental termination of freedom of movement *through means intentionally applied*." Brower v. County of Inyo, 489 U.S. 593, 597 (1989) (emphasis in original). Gooding and Bauer assert that there was no seizure because Robinson was not the intended object of their force. In other words, they assert that because they did not intend to shoot Robinson and did not in fact shoot him, Robinson did not suffer a Fourth Amendment seizure. This Court disagrees.

In making this determination, the Court finds the recent Eleventh Circuit opinion of Vaughan v. Lawrence, 343 F.3d 1323 (11th Cir. 2003) instructive. As the Eleventh Circuit noted in Vaughan, the Supreme Court has cautioned against a too finely drawn reading of "means intentionally applied." See

Vaughan. 343 F.3d at 1329 (quoting Brower, 489 U.S. at 598). In Vaughan, the Eleventh Circuit explained that "[i]t is not necessary for the means by which a suspect is seized conform exactly to the means intended by the officer." Id. Rather, "it is enough 'that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.'" Id. (quoting Brower, 489 U.S. at 599).

In the instant case, Gooding fired at the Oldsmobile and Bauer fired at Hart in an attempt to stop the car. Construing the facts in favor of Plaintiff for purposes of summary judgment, a seizure occurred when Gooding and Bauer intentionally fired their weapons at the moving vehicle with the intention of stopping that car. See Tennessee v. Garner, 471 U.S. 1, 7 (1985)("[w]henever an officer restrains the freedom of a person to walk away, he has seized that person.")(citation omitted); see also Fisher v. City of Memphis, 234 F.3d 312, 318-19 (6th Cir. 2000) ("By shooting at the driver of the moving car, [the

officer] intended to stop the car, effectively seizing everyone inside, including the [passenger]."). Having determined that in seizing the Oldsmobile, Gooding and Bauer effectively seized all three occupants of the vehicle, the Court must next determine whether the force used to stop the Oldsmobile was reasonable.

ii. Reasonableness of Force

Gooding and Bauer assert that, even if their actions do constitute a seizure, summary judgment on Count I should be granted in their favor because their use of force was reasonable and justified. The Supreme Court has instructed that "all claims that law enforcement officers have used excessive force - deadly or not - in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its reasonableness' standard." Graham v. Connor, 490 U.S. 386, 395 (1989). The determination of whether the force used is reasonable "requires a careful

balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." Id. at 396 (internal quotations omitted) (quoting Garner, 471 U.S. at 8 (quoting United States v. Place, 462 U.S. 696, 703 (1983))). The reasonableness inquiry in a Fourth Amendment excessive force case is an objective one. The question is whether the officer's actions are objectively reasonable in light of the facts confronting the officer, regardless of the officer's underlying intent or motivation. See id. at 397.

Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," Bell v. Wolfish, 441 U.S. 520, 559 (1979), "its proper application requires careful attention to the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether

[the suspect] is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396 (citing Garner, 471 U.S. at 8-9 (the question is "whether the totality of the circumstances justifie[s] a particular sort of... seizure")). Therefore, courts must analyze use of force on a case-by-case basis "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. at 369. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation." Graham, 490 U.S. at 396-97. In other words, "the force used by a police officer in carrying out an arrest must be reasonably proportionate to the need for that force." Ferraro, 284 F.3d at 1198. Using these principles, the Court will now examine whether Gooding and Bauer's force was reasonable under the circumstances of this case.

In addressing each of the three Graham factors enumerated above, the Court must draw inferences from the evidence in the light most favorable to Plaintiff, the non-moving party, and resolve all reasonable doubts in that party's favor. The first Graham factor is the severity of the crime at issue. The Eleventh Circuit has instructed that, regardless of the severity of the alleged offense, some force by a police officer when making a custodial arrest is necessary and lawful. See Ferraro, 284 F.3d at 1197 ("'Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.'" (quoting Graham, 490 U.S. at 396)). As the Court noted in its February 6, 2003 Order, the underlying search and arrest warrants were based on the crime of possession of a controlled substance (rock cocaine) with an intent to sell. Hart's criminal history included approximately forty arrests and nineteen

convictions (Doc. No. 134, Bauer Dep., p. 133). Further, at the time of the incident, Hart was out of jail on bail for attempted murder with a firearm, and the firearm had not been recovered (Doc. No. 134, Bauer Dep., p.133). Bauer and Gooding were aware of the above facts and circumstances. Thus, reviewing the record now available to the Court, the Court concludes that the potential criminal activity occurring in or around the residence was sufficiently severe to satisfy the first prong of the Graham analysis.

The second Graham factor addresses whether the suspect poses an immediate threat to the safety of the officers and others. When Gooding and Bauer fired their weapons, all pedestrian and automobile traffic had been blocked in the immediate vicinity of the residence. However, the possibility of harm to the public was not eliminated - Bahia Vista is a residential street that connects nearby with heavily-traveled U.S. 41. Thus, had Hart successfully fled from the scene, his

path of flight could have posed a threat of death or serious injury to the public. Viewing the facts in the best light for Plaintiff, Gooding and Bauer fired their shots from behind the automobile as it was moving away from them. Thus, there was no threat of immediate harm to either Gooding or Bauer. However, the surveillance team and other officers remained in the vicinity of the residence. Had Hart continued his aggressive course of escape, it is likely that his vehicle could have also been a danger to the members of the surveillance team and other members of the SWAT team.

Finally, under Graham, this Court must determine whether Plaintiff was actually resisting arrest or attempting to evade arrest. It is undisputed that Hart was attempting to evade arrest by flight. The Supreme Court has held that an officer may use deadly force to seize a fleeing felony suspect when the officer: (1) "has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to

others" or "that he has committed a crime involving the infliction or threatened infliction of a serious physical harm;" (2) reasonably believes that the use of deadly force was necessary to prevent escape; and (3) has given some warning, if feasible, about the possible use of deadly force. See Garner, 471 U.S. at 11-12.

Under the instant facts, the deputies wore clothing clearly identifying them as law enforcement officers, had their guns drawn, and had repeatedly shouted at the occupants of the Oldsmobile to exit the vehicle. The occupants of the Oldsmobile flouted these commands to exit, and instead, Hart began to drive the car backward and forward in an effort to escape from the front yard of the residence. Knowing Hart's pattern of evading arrest and his violent criminal history, it was reasonable for the deputies to believe that deadly force was necessary to prevent Hart from escaping.

Thus, after considering the facts and circumstances of this case, the Court finds that Gooding and Bauer's use of deadly force was not excessive. Therefore, Gooding and Bauer are entitled to judgment on Count I.

c. Qualified Immunity

Even if the Court found that Gooding and Bauer had proximately caused Robinson's death and that the force used had violated Robinson's constitutional rights, Gooding and Bauer would still be entitled to immunity from this suit. "Qualified immunity protects government officials, in their individual capacities, from suit unless the law preexisting the defendant official's supposedly wrongful act was already established to such a high degree that every objectively reasonable official standing in defendant's place would be on notice that what the defendant official was doing would be clearly unlawful given the circumstances." Pace v. Capobianco, 283 F.3d 1275,1282 (11th Cir. 2002)(citing Lassiter v. Alabama

A & M Univ., 28 F.3d 1146,1149-50 (11th Cir. 1994)(en banc)). In other words, "[t]he standard of objective reasonableness which is used to assess an officer's entitlement to qualified immunity 'provides ample protection to all but the plainly incompetent or those who knowingly violate the law.'" Priester v. City of Riviera Beach, 208 F.3d 919,925 (11th Cir. 2000)(quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

For qualified immunity to apply, the government official must first prove that he was acting within his discretionary authority. See Cottone v. Jenne, 326 F.3d 1352,1357-58 (11th Cir. 2003). In this case, it is undisputed that Gooding and Bauer were acting within their discretionary authority. Thus, the burden shifts to Plaintiff to show that Gooding and Bauer are not entitled to qualified immunity. See id. at 1358. The Supreme Court has outlined the following two-prong test for determining if an officer is entitled to qualified immunity: (1) taking all of the facts in the light most favorable

to the plaintiff, do the facts demonstrate a violation of a constitutional right, and (2) if so, was that constitutional right "clearly established?" See Saucier v. Katz, 533 U.S. 194, 201 (2001).

As stated above, even construing the facts in a light most favorable to Plaintiff, the Court concludes that a reasonable jury could not find that Gooding and Bauer violated Robinson's constitutional rights when they used deadly force to stop the Oldsmobile driven by Hart. Prior to this September 30, 1999 event, the general law regarding an officer's use of deadly force during an attempted arrest was already clearly established in the Supreme Court case of Tennessee v. Garner. However, as the Supreme Court has stated: "Yet that is not enough. Rather... 'that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand

that what he is doing violates that right.'" Saucier, 533 U.S. at 202.

The Eleventh Circuit has noted that with Fourth Amendment excessive force claims, there is no bright line test for determining when force is so excessive that a clearly established constitutional right has been violated. See Priester, 208 F.3d at 926 (citation omitted). Construing the facts in the light most favorable to Plaintiff, this Court must determine whether the state of the law at the time of the incident gave Gooding and Bauer fair warning that their force was unconstitutional. See Hope v. Pelzer, 536 U.S. 730,741 (2002).

In Garner, the Supreme Court stated that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." Garner, 471 U.S. at 11. In the instant case, Hart was a felon who was out on bail after having been charged

with attempted murder. When the SWAT team surrounded the Oldsmobile and gave commands to exit the vehicle, Hart instead proceeded to aggressively move the car backward and forward in an effort to flee. To prevent Hart from fleeing and further endangering the lives of others who may have been in his unpredictable path of flight, Gooding shot at the back tire of the Oldsmobile and Bauer shot twice at Hart. Neither of the parties has offered, nor has the Court found, law that would have given Gooding and Bauer fair warning that this force violated the constitutional rights of the occupants of the fleeing Oldsmobile.

For Plaintiff to survive summary judgment on the issue of qualified immunity, she must produce evidence that would allow a fact-finder to find that no reasonable person in Gooding and Bauer's positions would have thought the facts were such that deadly force was necessary to prevent imminent death or great bodily harm to themselves or others. See Wood v. City

of Lakeland, 203 F.3d 1288, 1292 (11th Cir. 2000). Plaintiff has not met this burden. Thus, because the preexisting law did not give Gooding and Bauer fair warning that shooting at the fleeing vehicle and its driver under these circumstances would clearly violate federal law, Gooding and Bauer are entitled to immunity from this suit and judgment in their favor as to Count I. Gooding and Bauer's motions for summary judgment as to Count I are **GRANTED**.

2. Count II - Gooding and Bauer's Failure to Protect Decedent from Unconstitutional Harm

Law enforcement officers may be held liable under §1983 for failing or refusing to intervene when another officer uses excessive force. See Priester, 208 F.3d at 924; see also Ensley v. Soper, 142 F.3d 1402, 1407 (11th Cir. 1998). This claim against Gooding and Bauer, however, presupposes that Gooding and Bauer did in fact use excessive force. As stated above, the Court does not find that the force used by either Gooding or Bauer was excessive under the facts and

circumstances of this case. Therefore, Plaintiffs claim that either deputy failed to protect Robinson from unconstitutional harm must fail.

However, even if the Court had found that Gooding and Bauer used excessive force, liability arises only when the officer is in a position to intervene yet fails to do so. See Ensley, 142 F.3d at 1407 (citations omitted). Specifically, an officer present at the scene has a duty to take reasonable steps to protect a victim of another officer's use of excessive force. See Fundiller v. Cooper City, 777 F.2d 1436, 1442 (11th Cir. 1985). It is undisputed that both Gooding and Bauer's shots happened in rapid succession and occurred within a matter of seconds. Moreover, Plaintiff has come forward with no facts from which a reasonable jury could find that either Gooding or Bauer was in a position to intervene and failed to do so. Accordingly, Gooding and Bauer's respective motions for summary judgment as to Count II are **GRANTED.**

3. Count III - Supervisory Liability of Gooding

Plaintiff also alleges that Gooding, as Bauer's supervisor, should be held liable for any excessive force employed by Bauer. "[Supervisory liability under § 1983 occurs either when the supervisor personally participates in the alleged unconstitutional conduct or when there is a causal connection between the actions of a supervising official and the alleged constitutional deprivation." See Cottone, 326 F.3d at 1360 (citations omitted). The standard for holding a supervisor liable for the actions of his subordinate is extremely rigorous. See id. at 1360-61 (citation omitted). Like Plaintiff's claim in Count II, Plaintiff's claim in Count III presupposes that Bauer's force was unconstitutional. The Court has already found that Bauer's force was not excessive, and, thus, this claim by Plaintiff must also fail. Accordingly, Gooding's motion for summary judgment as to Count III is **GRANTED.**

4. Count IV - Municipal Liability of the County and Sheriff Balkwill

The County and Balkwill separately move for summary judgment on Count IV. In Count IV, Plaintiff alleges a § 1983 claim against the County and Balkwill, in his official capacity, for maintaining "policies, practices and customs exhibiting gross and deliberate indifference to the constitutional rights of the citizens and residents of Sarasota County, which were the moving force behind, as well as the direct and proximate cause of, the constitutional violations committed by the individual defendants against Plaintiff's decedent." (Doc. No. 96, Second Amended Complaint, ¶68).

a. Liability of the County

The County argues that Plaintiff's claim against the County must fail because Plaintiff cannot prove that the County has any authority and responsibility over the law enforcement functions of the Sheriff or that any of the defendants acted as

the final policymaker for the County relative to the law enforcement function at issue in this case.

"A county's liability under § 1983 may not be based on the doctrine of respondeat superior." Grech v. Clayton County, Ga., 335 F.3d 1326,1329 (11th Cir. 2003) (citations omitted). Rather, "[a] county is 'liable under section 1983 only for acts for which [the county] is actually responsible.'" Id. Therefore, counties may be held liable under § 1983 only for the execution of their own governmental policies or customs. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978). In other words, a county can never be liable under § 1983 for the acts of those officials whom a county has no authority to control. See Turquitt v. Jefferson County, 137 F.3d 1285, 1292 (11th Cir. 1998).

To succeed on this claim, Plaintiff must prove that: (1) the County has authority and responsibility over the governmental function at issue, i.e., the SCSO law enforcement

function and, (2) Sheriff Balkwill, or any of the other defendants, has final policymaking authority for the County concerning the alleged constitutional violations at issue. See Grech, 335 F.3d at 1330. "A sheriff's policy or act cannot be said to speak for the county if the county has no say in what policy or action the sheriff takes." Id. at 1331. In deciding whether Sheriff Balkwill is the final policymaker[2] for the County in regard to his law enforcement function, the Court must look to Florida law. See City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988) (plurality opinion).

In determining whether the County controls Balkwill,[3] the Court must specifically determine whether the County, under Florida law, has control over Balkwill in his law

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[2] "'Policymaker" in § 1983 jurisprudence... is a term of art that refers to the official or body that speaks with final authority with respect to a particular governmental decision or action." See McMillian v. Johnson, 88 F.3d 1573,1579 (11th Cir. 1996)(citing Jett v. Dallas Independent School District, 491 U.S. 701, 737 (1989)).

[3] The Court notes that, at the time of the incident at issue in this case, Geoffrey Monge was the Sheriff of Sarasota County, Florida. Prior to the filing of this suit, Geoffrey Monge was replaced by Balkwill.

enforcement function, particularly for the execution of search and arrest warrants and the training and supervision of his employees in that regard. See Grech 335 F.3d at 1332. In making this determination, the focus is on "control, not labels." See id.; see also McMillian v. Monroe County, Ala., 520 U.S. 781, 786 (1997). Thus, the labeling of Florida sheriffs as "county officials" in the Florida Constitution is not determinative of whether the County has control over Balkwill in regard to the particular law enforcement function at issue in this case. See Grech, 335 F.3d at 1332 (finding the Georgia Constitution's characterization of sheriffs as "county officers" not determinative).

In Florida, sheriffs are independently elected officials, Florida law requires that the independence of such officials be preserved concerning a host of matters, including the selection of personnel and the hiring, firing, and setting salaries of such personnel. See FLA. STAT. § 30.53. Moreover, the manner in

which Flo[illegible] sheriffs are compensated is determined by state statute. See FLA. STAT. § 30.48. Section 30.15 of the Florida Statutes outlines the powers, obligations, and duties of Florida sheriffs. Under that section, Florida sheriffs are required to "[e]xecute all orders of the boards of county commissioners of their counties, for which services they shall receive such compensation, out of the county treasury, as said boards may deem proper" and to "[b]e conservators of the peace in their counties." FLA. STAT. § 30.15(l)(d) & (e). However, this statute does not state or even suggest that a county has a role in a sheriffs law enforcement function. The county in which a sheriff serves is given the power to determine a sheriff's overall budget, but it is given no say as to the specific expenditures of a sheriff. See FLA. STAT. § 30.49. A sheriff may even appeal a county's decision regarding his budget to the Executive Office of the Governor. See FLA. STAT. § 30.49(4). Further, the power to suspend a sheriff from his duties is reserved for the governor,

not the county officials in which the sheriff serves. See FLA. CONST. ART. IV § 7(a).

Regarding law enforcement, the function at issue in this case, Florida sheriffs shall be "conservators of the peace in their counties." See FLA. STAT. § 30.15(l)(e). Thus, sheriffs in Florida act as agents for the state in enforcing the laws of the state. Notably, Florida law does not include law enforcement powers as one of the statutorily created powers of counties. See FLA. STAT. § 125.01. Further, under Florida law, sheriffs are the governmental entities responsible for the neglect and default of their deputies. See FLA. STAT. § 30.07. Counties have no role in the training or supervision of a sheriff's deputies. While the Court acknowledges that the County funds the operation of the SCSO and allegedly provides its representation in this case, these factors are insufficient for this Court to find that a county in Florida has control over the sheriff that services that county. See Grech, 335 F.3d at 1340 n. 25. The Supreme Court in

McMillian v. Monroe County stated that "[t]he county's payment of the sheriff's salary does not translate into control over him, since the county neither has the authority to change his salary nor the discretion to refuse payment completely." 520 U.S. 781,791 (1997). Similarly, counties in Florida do not have authority to change a sheriff's salary or to refuse payment completely.

The Court notes that the Eleventh Circuit has held that a Florida sheriff is the final policymaker for the county in which he serves in regard to the termination of a deputy. See Lucas v. O'Loughlin, 831 F.2d 232, 235 (11th Cir. 1987). Since Lucas, the Eleventh Circuit has recognized that finding that a sheriff acts as the final policymaker of the county with regard to one function does not necessitate a finding that a sheriff is the final policymaker of the county in regard to other functions. See McMillian v. Johnson, 88 F.3d at 1583 (concluding that a sheriff in Alabama is not a final policymaker

for the county in regard to law enforcement). "[A]n official simultaneously may exercise county authority over some matters and state authority over others." See id. At issue in Lucas was whether a sheriff was a final policymaker for the county with regard to local, administrative duties. At issue in this case is whether a sheriff is the final policymaker with respect to the state law enforcement duties - specifically, the service of warrants.

Clearly, Balkwill is the final policymaker for his agency with regard to law enforcement. See Battista v. Cannon, 934 F. Supp. 400, 404 (M.D. Fla. 1996), but this does not necessarily mean that he is the final policymaker for the county. "[T]hat [the sheriff] has absolute authority over an area shows only that [the sheriff] is a final policymaker in the area; it says nothing about whose authority [the sheriff] exercises in that area, i.e.,

whether [the sheriff] is a final policymaker for the county or the state." McMillan v. Johnson, 88 F.3d at 1582.[4]

In Florida, a county has no authority and control over a sheriff's law enforcement function. Like the Georgia county in Grech, Sarasota County does not, and cannot, direct Balkwill on how to arrest a criminal, how to hire, train, supervise, or discipline his deputies, what policies to adopt, or how to operate his office, much less (and most importantly for the law enforcement function at issue) how to execute search warrants and arrest warrants. Under § 1983, a county is only liable for acts for which the county is actually responsible. See Marsh v. Butler County, 268 F.3d 1014, 1027 (11th Cir. 2001)(en banc). Since Sarasota County is not responsible for the law

[4] The Court notes that finding that a Florida sheriff is not the final policymaker for a Florida county with regard to its law enforcement function does not necessarily mean that a Florida sheriff is instead the final policymaker for the state. See McMillan v. Johnson, 88 F.3d at 1579 ("We need not, and do not, decide whether sheriffs are state policymakers to hold that they are not county policymakers.").

enforcement function of Sheriff Balkwill and the SCSO,[5] Sarasota County is not a proper party to this lawsuit. Accordingly, Sarasota County's motion for summary judgment (Doc. No. 123) is **GRANTED**.

b. Liability of Balkwill in his Official Capacity

Plaintiff's claims against Balkwill "in his official capacity" really amount to claims against the SCSO. An 'official capacity' suit is, in all respects other than name, to be treated as a suit against the entity. See, Welch v. Laney, 57 F.3d 1004, 1008 (11th Cir. 1995). "'Because the real party in interest in an official-capacity suit is the governmental entity and not the named official, the entity's policy or custom must have played a part in the violation of federal law [or the Constitution].'" Merideth v. Grogan, 812 F. Supp. 1223, 1231

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[5] Under the Florida Constitution and the Florida Statutes, a sheriff's office is a separate legal entity from the county in which it serves. See Samarco v. Neumann, 44 F. Supp. 2d 1276, 1286 n. 1 (S.D. Fla. 1999).

n.5 (N.D. Ga. 1992) (quoting Hafer v. Melo, 502 U.S. 21, 25 (1991)).

Clearly, a SCSO employee who acted according to a formal written policy of the SCSO would be acting so as to render the SCSO potentially liable for that employee's actions. In this case, Plaintiff is not asserting that the alleged violations resulted from a formal written policy of the SCSO but from custom and practice. Because "[a] county must be held accountable for more than its officially-codified policies," Van Ooteghem v. Gray, 628 F.2d 488, 495 (5th Cir. 1980),[6] "the court should examine not only the relevant positive law, including ordinances, rules, and regulations, but also the relevant customs and practices having the force of law." Mandel v. Doe, 888 F.2d 783, 793 (11th Cir. 1989). To prove § 1983 liability against a county or municipality based on a *de*

[6] Decisions of the former Fifth Circuit filed prior to October 1,1981 constitute binding precedent in the Eleventh Circuit. See Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc).

facto custom or policy, a plaintiff must establish a widespread practice that, although not authorized by written law or express policy, "is so permanent and well settled as to constitute a 'custom or usage with the force of law.'" Brown v. City of Fort Lauderdale, 923 F.2d 1474, 1481 (11th Cir. 1991) (citations omitted). "In other words, a longstanding and widespread practice is deemed authorized by the policy making officials because they must have known about it but failed to stop it." Id. Further, the municipal policy or custom must have directly caused the alleged constitutional deprivation. See Canton v. Harris, 489 U.S. 378, 386 (1989); see also Oklahoma City v. Tuttle, 471 U.S. 808, 824 (1985).

i. Failure to Discipline

Plaintiff argues that Balkwill has a custom of not adequately disciplining deputies who shoot citizens. A municipality's failure to take remedial steps to correct constitutional violations is not deemed a policy unless "the

failure to take remedial steps ... amount[s] to a deliberate indifference or tacit authorization of the offensive acts." Cannon v. Taylor, 782 F.2d 947, 951 (11th Cir. 1986)(citing Turpin v. Mailet, 619 F.2d 196 (2d. Cir. 1980)). As the Eleventh Circuit has stated, "a *persistent* failure to take disciplinary action against officers can give rise to the inference that a municipality has ratified conduct, thereby establishing a 'custom' within the meaning of Monell." See Fundiller, 777 F.2d at 1443 (citation omitted) (emphasis added).

Immediately following the shooting incident, the Criminal Investigation Bureau's ("CIB") shooting investigation team initiated their investigation as required by the SCSO General Order 4010.06 (Doc. No. 134, Tab 6, Pingel Aff.). On or about October 6, 1999, the CIB shooting investigation team concluded their investigation and submitted their report to the Sheriff and the SCSO Shooting Review Board ("SRB")(Doc. No. 134, Tab 6, Pingel Aff.). The CIB report included

investigative materials and witness statements (Doc. No. 134, Tab 6, Pingel Aff., Attachment). The Court notes that the focus of the CIB's investigation is fact-gathering relative to any potential criminal activity, but that the CIB may also consider whether Gooding and Bauer violated any internal policies (Doc. No. 134, Monge Dep., p. 25-26, 35).

In contrast, the focus of the SRB is on reviewing the CIB report, taking testimony if necessary, and evaluating whether any internal policies were violated (Doc. No. 134, Monge Dep., p. 26-28). In other words, the SRB can expand the investigation beyond that of the CIB (Doc. No. 134, Monge Dep., p. 88). Appointing a SRB was not mandatory; rather, it was at the discretion of Sheriff Geoffrey Monge, the Sarasota County Sheriff at the time of the incident (Doc. No. 134, Monge Dep., p. 26-27). The State of Florida does not require such an investigative board. Nevertheless, Sheriff Monge assigned a new SRB to every shooting case (Doc. No. 134,

Monge Dep., p. 29). With the exception of the Major, each SRB was composed of a different group of members, but always included the Major, two Captains, a firearms instructor, and a first-class deputy (Doc. No. 134, Monge Dep., p. 29).

The SRB convened on October 21, 1999 (Doc. No. 134, Tab 13, Balkwill Aff.). Having already reviewed the CIB report, the SRB panel questioned additional witnesses, reviewed the pertinent SCSO policies, and discussed the facts of the incident relative to the SCSO policies (Doc. No. 134, Tab 13, Balkwill Aff.). Ultimately, the SRB concluded that there had been no violation of any SCSO policies by either Gooding or Bauer (Doc. No. 134, Tab 13, Balkwill Aff.). This conclusion was presented to Sheriff Monge that same day (Doc. No. 134, Monge Dep., p. 62, Exh. 1).

Next, Sheriff Monge accepted the conclusion of the SRB and forwarded the CIB report and the results of the SRB to the State Attorney for his review (Doc. No. 134, Monge

Dep., p. 34). On November 9, 1999, the State Attorney concluded that the use of deadly force was justified (Doc. No. 134, Tab 8, Monge Aff., Exh. A). Then, the United States Department of Justice investigated the incident and determined that there was insufficient evidence to "establish a prosecutable violation of the federal criminal civil rights statutes" (Doc. No. 134, Tab 8, Monge Aff., Exh. B). Upon consideration of these facts, this Court cannot find that disciplinary action was warranted. Further, even if disciplinary action was warranted, no reasonable jury could conclude that the Sheriff, either Monge or Balkwill, has persistently failed to take disciplinary action such that he has established a custom of ratifying use of force.

ii. Ratification of Conduct

Plaintiff also asserts that the Sheriff ratified Gooding and Bauer's conduct by doing the following: persistent failure to discipline; public statements immediately after the incident; lack

of meaningful investigation; subsequent relaxation of the deadly force policy; and subsequent promotions of Gooding and Bauer. In the previous sub-section, the Court already determined that two of these allegations, the persistent failure to discipline and lack of meaningful investigation, are without merit. For the reasons stated below, the Court also finds that the remaining three allegations lack merit.

"[L]iability on the basis of ratification exists when a subordinate public official makes an unconstitutional decision and when that decision is then adopted by someone who does have final policymaking authority" See Matthews v. Columbia County, 294 F.3d 1294, 1297 (11th Cir. 2002). Clearly, liability on this basis presupposes that the subordinate official's decision was unconstitutional. Here, as explained above, the Court has already found that Gooding and Bauer's decisions to shoot were reasonable and justified. Thus, Plaintiff's ratification theory fails under these facts.

iii. Failure to Train

Plaintiff argues that Balkwill does not adequately train SCSO deputies. The Supreme Court has stated that there are limited circumstances in which "failure to train" may be the basis for § 1983 liability. See Canton, 489 U.S. at 387. "Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality - a 'policy' as defined by our prior cases can [the sheriff's office] be liable for such a failure under § 1983." Id. at 389.

The SCSO SWAT team is comprised of full-time certified SCSO deputies. To be chosen as a member of the SWAT team, an applicant must meet the following criteria: be a first-class deputy in good standing; possess special skill or talent; receive a "good" or better grade on physical fitness testing; have an acceptable score on the obstacle course; and complete both an oral board exam conducted by the SWAT team and a psychological evaluation. In addition to SWAT

duties, all SWAT team members have full-time regular assignments within the SCSO.

It is undisputed that SCSO offered SWAT training classes and required attendance. However, "the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform." Id. at 390. From 1987 to September 30, 1999, Gooding participated in 1,435 hours of recorded in-service training and SWAT training with the SCSO in addition to his command and management training he received outside the SCSO (Doc. No. 134, Tab 11, Pelfrey Aff.). This training included training on vehicle take-down, discretionary shooting, stress shooting, use of force during pursuit, bullets and effects on cars, defensive tactics, forced vehicle stops, levels of resistance, scenarios, use of force, vehicle assault, warrant service, hostage rescue, and firearm proficiency training (Doc. No. 134: Tab 11, Pelfrey Aff.; Tab 2, Kenney Aff.). From 1990 to September 30, 1999, Bauer

participated in 1,019 hours of recorded in-service and SWAT training with the SCSO (Doc. No. 134, Tab 11, Pelfrey Aff.). Bauer's training included training on use of deadly force, stress shooting, vehicle take-down, use of force, firearm policy test, forced vehicle stops, defensive tactics, vehicle assault, warrant service, hostage rescue, and extensive firearm proficiency training (Doc. No. 134: Tab 11, Pelfrey Aff; Tab 2, Kenney Aff.). The SWAT team training schedule includes two mandatory days of training per month (Doc. No. 134, Tab 2, Kenney Aff.). Prior to the September 30, 1999 incident, the SWAT team training had included extensive firearm proficiency training and many hours of scenarios of judgment training relative to when it is permissible and impermissible to use deadly force in the course of law enforcement duties (Doc. No. 134, Tab 2, Kenney Aff.). The Court concludes that this training was adequate in relation to the tasks that the SWAT team members performed.

However, even if the SWAT team training had been inadequate, Plaintiff would need to establish that the inadequate training was part of a governmental custom or policy. See Kerr v. City of West Palm Beach, 875 F.2d 1546, 1555 (11th Cir. 1989). To meet this heavy burden, Plaintiff must prove that the failure to adequately train manifested the government's deliberate indifference to the safety of its inhabitants. See id. A government policy cannot be established by a single incident. See Tuttle, 471 U.S. at 823-24. Thus, the Court concludes that there is insufficient evidence for a reasonable jury to find that this is one of the limited circumstances in which the government had a policy of failing to train deputies in deliberate disregard of the safety of its citizens.

All three of Plaintiff's theories of municipal liability under § 1983 must fail. Plaintiff has not produced sufficient evidence that could lead a jury to believe that the alleged violations stemmed from a widespread practice of not

adequately disciplining deputies involved in shooting incidents. Additionally, Plaintiff has not proven that Balkwill ratified unconstitutional conduct of Gooding and Bauer. Lastly, Plaintiff has not met her burden of proving that this case fits the limited circumstances where a failure to train may be a basis for § 1983 liability. Accordingly, Balkwill's motion for summary judgment as to Count IV is **GRANTED.**

B. Pendent State Claims

Having disposed of Plaintiff's federal claims, this Court may decline to exercise jurisdiction over Plaintiff's five remaining pendent state law claims, pursuant to 28 U.S.C. § 1367(c)(3). See, e.g., United Mine Workers of America v. Gibbs, 383 U.S. 715, 727 (1966) ("[I]f the federal claims are dismissed before trial... the state claims should be dismissed as well.); see also Carnegie-Mellon University v. Cohill, 484 U.S. 343,349-50 (1988) (reaffirming authority of district courts to refuse to hear pendent state claims when the federal claim has

been disposed of prior to trial). In deciding whether to dismiss the pendent state claims, this Court should consider judicial economy, fairness, and convenience. See Baggett v. First Nat'l Bank of Gainesville, 117 F.3d 1342, 1353 (11th Cir. 1997).

In this case, Plaintiff filed her original complaint in state court. Had Defendants not removed this case, it likely would have remained in state court. At this point, all remaining claims are pendent state actions. The interests of judicial economy, fairness, and convenience require that the remaining claims be remanded to state court, which is better equipped to determine the merits of these pendent state claims. Accordingly, this Court declines to exercise supplemental jurisdiction over Plaintiff's five pendent state claims and hereby remands those claims to state court pursuant to 28 U.S.C. § 1367(c)(3).

IV. Conclusion

Upon consideration, it is ORDERED AND ADJUDGED that:

1. Defendant Sarasota County's Motion for Summary Judgment (Doc. No. 123) is **GRANTED**;

2. Defendant William F. Balkwill's Motion for Summary Judgment (Doc. No. 125) is **GRANTED** as to Count IV;

3. Defendant Timothy L. Bauer's Motion for Summary Judgment (Doc. No. 128) is **GRANTED** as to Counts I and II;

4. Defendant Kevin L. Gooding's Motion for Summary Judgment (Doc. No. 131) is **GRANTED** as to Counts I, II and III;

5. The Court declines to exercise supplemental jurisdiction over Plaintiff's pendent state claims pursuant to 28 U.S.C. § 1367(c)(3);

6. The pendent state claims are hereby **REMANDED** to the Twelfth Judicial Circuit, in

and for Sarasota County, Florida; and

7. The Clerk is directed to do the following: **ENTER JUDGMENT** for Defendants Gooding and Bauer on Count I and Count II, for Defendant Gooding on Count III, and for Defendants Sarasota County and Balkwill on Count IV; **CLOSE** the case; and **TERMINATE** all pending motions.

DONE AND ORDERED at Tampa, Florida, this ___ day of January, 2004.

s/_____
SUSAN C. BUCKLEW
United States District Judge

Copies to:
Counsel of Record

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

[FILED SEPTEMBER 29, 2005]

No. 04-10550-EE

DIANNE TROUPE, as Personal Representative, for the Estate of Ricardo Robinson, deceased,

Plaintiff-Appellant-
Cross-Appellee,

versus

SARASOTA COUNTY, FLORIDA, a Florida municipal corporation and a political subdivision of the State of Florida, GEOFFREY MONGE, individually and in his official capacity as the former Sheriff of Sarasota County, Florida, et al.,

Defendants-Appellees,

WILLIAM F. BALKWILL, in his official capacity as the Sheriff of Sarasota County, Florida, KEVIN L. GOODING, individually and in his official capacity as a Sarasota County, Florida Deputy Sheriff, TIMOTHY L. BAUER, individually and in his official capacity as a Sarasota County, Florida Deputy Sheriff,

Defendants-Appellees-
Cross-Appellants.

On Appeal from the United States District Court for the Middle District of Florida

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Before TJOFLAT and KRAVITCH, Circuit Judges and LIMBAUGH*, District Judge.

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) For Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/_____
UNITED STATES CIRCUIT JUDGE

*Honorable Stephen N, Limbaugh, United States District Judge for the Eastern District of Missouri, sitting by designation.

ORD-42
(12/01)

(3)

MAR 27 2006
OFFICE OF THE CLERK

No. 05- 1100

IN THE SUPREME COURT OF THE UNITED STATES

DIANNE TROUPE, as Personal Representative
For the Estate of Ricardo Robinson, deceased, et al.,

Petitioners,

v.

SARASOTA COUNTY, FLORIDA, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit applied the correct standard in determining whether the passengers in the car driven by the sole suspect sought were subjected to a Fourth Amendment "seizure" when deadly force was used in attempting to stop only the driver.

2. Whether the Eleventh Circuit's ruling that shooting the suspect driver of an automobile does not constitute a Fourth Amendment "seizure" of the passengers is in conflict with this Court's precedent and the decisions of the other circuits.

3. Whether distinguishing what a reasonable officer "could have believed" with what a reasonable officer "would have believed" constitutes a distinction without a difference in analyzing whether the use of deadly force is "reasonable" under the standard set forth in *Graham v. Connor*, 490 U.S. 386 (1989).

4. Whether the Eleventh Circuit's conclusion that a suspect's decision to avoid arrest through vehicular flight constitutes an independent, intervening cause when the suspect's decision preceded the use of force and continued unabated following the use of force is in conflict with decisions of the other circuits.

5. Whether the Eleventh Circuit's qualified immunity analysis followed this Court's standard established in *Saucier v. Katz*, 533 U.S. 194 (2001), when the Eleventh Circuit determined that because the deputies' conduct did not violate a constitutional right there was no need to determine whether the deputies' conduct violated clearly established law.

6. Whether fair notice is provided by *Tennessee v. Garner*, 471 U.S. 1 (1985), that it is unlawful to use deadly force against a fleeing suspect set on evading arrest through vehicular flight where the suspect's car already struck two officers and was a few blocks away from a busy six-lane highway, thereby posing an immediate threat to the general public.

7. Whether the Eleventh Circuit's determination that summary judgment was appropriate in an official capacity claim under 42 U.S.C. § 1983 where no underlying constitutional violation occurred conflicts with decisions of the other circuits.

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INTRODUCTION

The United States Court of Appeals for the Eleventh Circuit correctly followed this Court's standards in holding (1) the actions of the deputies did not cause Petitioners' injuries, (2) the Petitioners were not seized as that term is defined under the Fourth Amendment, and (3) assuming *arguendo* a seizure occurred, the deputies' use of force was objectively reasonable. Thus, the opinion below correctly affirmed the District Court's determination that the individual deputies had not violated the Petitioners' constitutional rights. Accordingly, the opinion below correctly engaged in an abbreviated analysis of whether the deputies were entitled to qualified immunity under this Court's analysis in *Saucier v. Katz*, 533 U.S. 194 (2001), and whether the Sheriff employed an actionable policy or custom relative to discipline and/or training under this Court's analysis in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986). Under both the *Saucier* and *Heller* standards, it was appropriate for the Eleventh Circuit to conclude its analysis once it had determined there was no underlying violation. Moreover, as to a Fourth Amendment seizure, the decision below held, consistent with decisions of the other circuits; that stopping a vehicle's driver does not constitute a seizure of a passenger when the passenger is not the intended object of the use of force. Accordingly, because the opinion below is not in conflict with the decisions of the other circuits and correctly applied this Court's standards to the issues presented, the petition should be denied.

STATEMENT OF THE CASE

Petitioners filed their initial complaints in state court in Sarasota County, Florida in 2001. In 2002, Respondents collectively removed the cases to the United States District Court for the Middle District of Florida. In 2003, Petitioners filed their second amended complaints, the operative pleadings at bar, in which Petitioners alleged the following claims under 42 U.S.C. § 1983: Excessive Force against Gooding and Bauer; Failure to Protect Plaintiff from Unconstitutional Harm against Gooding and Bauer; Supervisory Liability against Gooding; and Official

Capacity Liability against Balkwill and Sarasota County. *See* Pet. for Writ of Cert. ("Pet."), at 32a-33a. Gooding, Bauer, Balkwill and Sarasota County[1] all separately moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. *Id.* at 33a.

In 2004, the District Court granted Respondents summary judgment in both cases as to all § 1983 claims. *Id.* at 79a-81a. The District Court found there was no constitutional violation because Petitioners' injuries were not proximately caused by the individual deputies' actions, and because the individual deputies' use of deadly force in effecting what the District Court concluded was a Fourth Amendment seizure was reasonable. *Id.* at 37a-49a. The District Court further found the individual deputies would be entitled to qualified immunity even if their actions were unconstitutional. *Id.* at 49a-54a. The District Court further found the lack of an underlying constitutional violation precluded Petitioners' claim that Gooding and Bauer failed to protect Petitioners from unconstitutional harm and Petitioners' supervisory liability claim against Gooding. *Id.* at 54a-56a. The District Court further found Balkwill was entitled to judgment as to Petitioners' official capacity claims for the following, mutually exclusive reasons: the absence of an underlying violation and the absence of a policy or custom of (1) failing to discipline deputies regarding the use of force, (2) ratifying unconstitutional conduct, and (3) failing to train deputies. *Id.* at 66a-78a.

The Eleventh Circuit affirmed, 419 F.3d 1160 (11th Cir. 2005), concluding, as the District Court had, that the driver's reckless flight caused the death and injury of Petitioners, not Bauer's decision to use deadly force. *Id.* at 13a, 22a. The Eleventh Circuit further held the Petitioners' Fourth Amendment claims

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[1] Petitioners' Civil Appeal Statement in the Eleventh Circuit indicated Petitioners disputed the District Court's conclusion that Sarasota County was not a proper party to this action. However, Petitioners have apparently abandoned this issue because the petition includes no argument on that issue, leaving Sarasota County with no argument necessitating a response. Accordingly, the petition should be denied, and summary judgment should be affirmed as to Sarasota County.

against the individual deputies failed because (1) the individual deputies did not seize the Petitioners, (2) assuming *arguendo* a seizure occurred, the force applied was reasonable, and (3) consequently, the individual deputies were entitled to qualified immunity. *Id.* at 13a-22a. Accordingly, summary judgment was affirmed as to Petitioners' supervisory liability claims against Gooding and official capacity claims against Balkwill because there was no underlying constitutional violation. *Id.* at 10a, n.5.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with a decision of this Court or of any other United States Court of Appeals. Indeed, as will be shown, the opinion below is consistent with the analyses established by this Court relative to the use of force under the Fourth Amendment, qualified immunity, and official capacity claims under § 1983. Notably, Petitioners' arguments relative to the issues presented in the petition, consistent with Petitioners' arguments in the courts below, are frequently based on assumptions and conclusions having no record support, but merely masquerading as "facts." As will be shown, the undisputed record evidence reveals Petitioners have presented no basis for granting this petition. Accordingly, the petition should be denied.

I. The Eleventh Circuit applied the correct standard in determining whether the passengers in the car driven by the sole suspect sought were subjected to a Fourth Amendment "seizure" when deadly force was used in attempting to stop only the driver.

Petitioners incorrectly contend the opinion below applied the wrong standard in concluding the Petitioners were not seized under the Fourth Amendment. Petitioners assert the opinion below, instead of applying a Fourth Amendment analysis, applied a Fourteenth Amendment substantive due process analysis. Pet. at 3. However, a careful reading of the opinion below shows a Fourth Amendment analysis was correctly applied in concluding the Petitioners were not seized. As to the Fourteenth Amendment, the Eleventh Circuit, *sua sponte*, simply determined there was also no

substantive due process violation, but in addition to, and not in lieu of, the Fourth Amendment seizure analysis.

The Eleventh Circuit began its consideration of the seizure issue with the Fourth Amendment. The Court correctly noted that before there may be any discussion of the reasonableness of the force applied, it must be shown the force applied effected a "seizure," i.e. a "governmental termination of freedom of movement through means intentionally applied." Pet. at 13a-14a, citing *Brower v. County of Inyo*, 489 U.S. 593 (1989). The opinion below further indicated that only "intervention directed at a specific individual" furnishes a basis for a Fourth Amendment seizure. Pet. at 14a. The Eleventh Circuit then considered a Fourteenth Amendment substantive due process analysis. However, in the very next paragraph, the opinion below clearly applies only the Fourth Amendment standard in concluding Gooding's shot, which missed, was merely an attempted seizure, consistent with this Court's decision in *California v. Hodari D.*, 499 U.S. 621 (1991). Pet. at 15a, citing *Hodari D.* The opinion below then addresses Bauer's shots, likewise applying only a Fourth Amendment standard, as evidenced by the Eleventh Circuit's citation to this Court's discussion of the Fourth Amendment seizure issue in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). Pet. at 15a.

Thus, the opinion below, after identifying both standards, and ruling out the Fourteenth Amendment, proceeds to correctly apply the Fourth Amendment standard to Gooding's attempted seizure and Bauer's use of force directed solely at the driver, concluding that neither had seized the Petitioners. Significantly, the opinion below reveals that under either theory, Fourth Amendment "seizure" or Fourteenth Amendment substantive due process, the undisputed evidence fails to establish a § 1983 claim. Accordingly, Petitioners' contention that the opinion below undermines this Court's decisions relative to Fourth Amendment seizure claims is without merit and should be rejected.

II. The Eleventh Circuit's ruling that shooting the suspect driver of an automobile does not constitute a Fourth

Amendment "seizure" of the passengers is not in conflict with this Court's precedent and the decisions of the other circuits.

Petitioners incorrectly contend that shooting a suspect driver of an automobile constitutes a Fourth Amendment seizure of the passengers. In support of their incorrect assertion, Petitioners solely, but mistakenly, rely on this Court's decision in *Brower*, 489 U.S. 593 (1989). In *Brower*, this Court held a Fourth Amendment seizure occurs only when there is a "governmental termination of freedom of movement through means intentionally applied," i.e. an intentional acquisition of physical control. *Brower*; *Lewis*, 523 U.S. 833, 844 (1998); *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003)("*Vaughan II*"). Notably, a proper reading of *Brower* provides support for the Respondents, not the Petitioners. While Petitioners urge *Brower* supports the argument that an "unintended person" can be seized, a close reading of *Brower* such "unintended person" must still be subjected to force intentionally applied to him, as where police intentionally restrain an innocent person mistakenly believed to be the suspect sought. *Brower*, citing *Hill v. California*, 401 U.S. 797 (1971). Conversely, no seizure results from an accidental or unintended termination of an individual's freedom of movement. *Id.* Thus, as the opinion below correctly recognized, "it is intervention directed at a specific individual that furnishes the basis for a Fourth Amendment claim." Pet. at 14a; *Landol-Rivera v. Cruz-Cosme*, 906 F.2d 791 (1st Cir. 1990); *Medeiros v. Town of South Kingstown*, 821 F. Supp. 823 (D.R.I. 1993)(no "constructive seizure" of passenger who was unintended object of police pursuit). Similarly, no seizure occurs where police make a show of authority but the subject does not yield. *Hodari D.*, 499 U.S. at 626-629 ("neither usage or common law tradition makes an attempted seizure a seizure"); *Adams v. City of Auburn Hills*, 336 F.3d 515 (6th Cir. 2003); *Lewis*, 533 U.S. at 845, n. 7. Indeed, "unless the officer's show of authority succeeds in restraining the person, the person has not been 'seized' within the meaning of the Fourth Amendment." *Latta v. Keryte*, 118 F.3d 693 (10th Cir. 1997); *Hodari D.*

In *Lewis*, this Court found no seizure of a non-suspect passenger where a police chase resulted in the death of the non-

suspect passenger on a motorcycle driven by the subject of a police pursuit, because the police pursuit was not intended to seize the non-suspect passenger. *Lewis*, 523 U.S. at 844, citing *Hodari D.*, 499 U.S. at 626 and *Brower*, 489 U.S. at 596-597; *Landol-Rivera* at 796. The police vehicle crashing into the non-suspect passenger after the motorcycle wrecked did not constitute means intentionally applied for the purpose of seizing the non-suspect passenger. *Lewis*, 523 U.S. at 844. This Court based its conclusion on the police officers' intent to stop the motorcycle, but not to seize the non-suspect passenger. *Id.* In contrast, the Eleventh Circuit, in *Vaughan II*, consistent with *Lewis*, held a Fourth Amendment seizure occurred where a deputy fired his weapon at a vehicle during a high speed pursuit, with the intent to "disable either the truck or [the driver]" for the purpose of seizing a suspect who was a passenger in the truck. *Vaughan II* at 1328-1329. The deputy's shot disabled neither the truck nor the driver, but it struck the passenger, who was the actual suspect the deputies sought to arrest. *Id.* Thus, the use of force achieved the result sought, the apprehension of the suspect, i.e. passenger. As the Eleventh Circuit declared:

> [T]he Supreme Court has held that it is enough "that a person be stopped by the very instrumentality set in motion …in order to achieve that result." That standard has been met in this case. Cox **fired his weapon to stop Vaughan** [the passenger] and Rayson, and one of those bullets struck Vaughan. **Because Vaughan was hit by a bullet that was meant to stop him, he was subjected to a Fourth Amendment seizure.**

Id. at 1329, internal citations omitted, emphasis added. Accordingly, the Eleventh Circuit concluded the plaintiff in *Vaughan II* was seized even though the immediate target of the shot was the vehicle and/or the driver because (1) the passenger plaintiff was the actual suspect the deputies sought, (2) the shot's purpose was to apprehend the suspect, i.e. passenger, and (3) the suspect was "stopped by the very instrumentality set in motion or put in place to achieve that result." *Vaughan II* at 1329, citing

Brower, 489 U.S. at 599. *Lewis* and *Vaughan II* thus demonstrate a Fourth Amendment seizure inquiry must focus on three facts: (1) identifying the intended object of the use of force, (2) identifying the intended purpose of the use of force, and (3) determining whether the result of the use of force was the intended result. At bar, these facts are undisputed. They demonstrate, as the opinion below correctly held, Petitioners were not "seized" by the individual deputies, thereby negating any Fourth Amendment application to this case.

1. Passengers were never intended objects of the use of force.

Unlike *Vaughan II*, the Petitioners were never the deputies' intended objects. It is undisputed the driver, Hart, was the only intended object of the use of force by both Gooding and Bauer. The arrest warrant identified only Hart as an object of the warrants. The SWAT planning and briefing focused solely on arresting Hart. The sole direction given during the briefing was to arrest Hart and secure the house. Indeed, no evidence shows any passenger was expected to be present, was identified by SWAT as engaged in threatening conduct, or was even seen by Bauer when he shot Hart. Inexplicably, Petitioners continue to adhere to the baseless conclusion that Bauer knew there were two passengers inside the vehicle when he shot at Hart. Pet. at 6. However, as shown, the undisputed record evidence reveals Bauer, standing in front of a rapidly accelerating car, shouting commands to stop with his gun drawn and pointed at the driver, whom he recognized as Hart, saw no passenger as he narrowly avoided being struck by the car and aimed his weapon at Hart.

Remarkably, Petitioners also continue to adhere to the inaccurate assumption that Gooding and Bauer believed the passengers, whom Bauer did not even know were in the car, to be "criminal suspects." Pet. at 6. Petitioners continue to rely on inconsequential labels in support of their contention they were seized. However, the only consequential label under the Fourth Amendment is whether the person is the "intended object" of the use of force. *Brower*, 489 U.S. at 596. Moreover, Petitioners'

assertion is factually incorrect, relying on factual assumptions based on three isolated, post-incident comments by Bauer and Gooding as support for their mistaken contention that Bauer and Gooding intended to seize Petitioners. It appears that Petitioners continue to rely first on Bauer's statement to CIB investigators, describing the deployment of SWAT to its staging area, "[w]e got to Temple Beth Shalom a very short time [later] because we were told that the suspects had entered a vehicle in front of the residence." Petitioners further rely on Bauer's CIB statement again, where Bauer later stated he was "watching the bad guys" during the encounter in the driveway. Lastly, Petitioners rely on Gooding's *post-incident* Use of Firearms Report, where he wrote that with knowledge of "two other *subjects*" he shot at a rear tire "in an attempt to prevent prolonged flight." On their face, none of the post-incident comments relied on by Petitioners demonstrates any intent to seize the passengers. Gooding's use of the term "subjects" does nothing to communicate intent. Indeed, Gooding, as the on-scene SWAT commander, described the passengers as simply two additional persons, i.e. "subjects" riding in Hart's car. Moreover, the mere use of what clearly is nothing more than colloquial police parlance in collectively describing the car's three occupants after the fact, simply does not establish an intent to seize all the car's occupants. This is particularly true where, as here, the plan's sole focus was Hart. Conspicuous by its continued absence is any effort of Petitioners to attach any factual significance to these post-incident references relative to the incident as it occurred. The reason for this is because they cannot.

2. Stopping the threat of Hart's aggressive driving was the purpose of the use of force.

The purpose of the use of force was to stop the threat posed by Hart's aggressive driving to the safety of deputies at the scene and in the immediate vicinity, as well as the public, not the apprehension of the passengers, i.e., Petitioners. Gooding's use of force was intended to alleviate what Gooding and others had determined was a threat of serious harm to deputies and others presented by Hart's aggressive driving. Gooding observed Hart had demonstrated a willingness to flee despite the risks to himself

and others, and concluded that Hart's continued aggressive driving created a serious risk of harm to both the deputies and the public. Notably, Gooding's thought process in deciding whether to use force considered the safety of the car's passengers. Gooding did not shoot at the driver in part because the passengers were in his line of fire. Similarly, Bauer's use of force was intended to stop Hart from driving the car in a manner that created a threat of serious harm to Bauer, other deputies and the public. As the incident unfolded, Bauer observed deputies moving to avoid being struck or forced into trees by the car as it moved from the driveway into the front yard. Bauer narrowly avoided being struck by Hart, who was still accelerating through the front yard and continuing to pose a serious threat of harm to anyone he "was going to encounter once he left that yard." Further, it is undisputed Bauer, who was originally located across the yard, did not even see any passengers when he fired his weapon.

3. The continued, aggressive driving by Hart was not the result intended by the use of force.

The undisputed facts show the passengers, i.e. Petitioners, were not stopped by the deputies' use of force. Rather, the driver's continued flight constituted an intervening cause of Petitioners' injuries. *See* Issue IV, *infra*. Thus, the result the deputies sought, the alleviation of the threat posed by Hart's aggressive driving, simply was not achieved by the deputies' use of force because Hart continued to aggressively drive away from the residence well after the shots were fired. It is undisputed Gooding's shot, intended for a rear tire, missed and hit nothing. Following Gooding's shot Hart, undeterred, continued his aggressive driving. Thus, Gooding's show of authority, which did not stop or otherwise restrain anybody, at most could amount to nothing more than an attempted seizure, which this Court has established cannot constitute a seizure. *Hodari D.* **Accordingly, Gooding's shot is of no legal consequence**. It is further undisputed that though one of Bauer's shots hit the driver, the driver continued undeterred to drive the car away from the residence and onto Bahia Vista, heading west. Thus, Bauer's "show of authority" similarly failed to alleviate the threat posed by Hart's aggressive driving as he drove away from the

residence. Indeed, the threat posed by Hart's continued aggressive driving was actually realized by the car's collision with the concrete wall and pole.

Accordingly, Petitioners' injuries were not even the result of the deputies' use of force. As the opinion below affirmed, "Hart's decision-making and reckless driving" were the sole cause of Peititoners' injuries. Pet. at 10a-13a, 37a-38a. Consistent with *Lewis*, *Vaughan II*, and the cases discussed *infra*, no "seizure" is produced by unintended events following, but not caused by the use of force.

In addition to being a correct decision, and contrary to Petitioners' assertion, the opinion below is not in conflict with the two circuit level decisions cited in the petition. A close reading of the opinion below and the Sixth Circuit's opinion in *Fisher v. City of Memphis*, 234 F.3d 312 (6th Cir. 2000), reveals the two cases are factually distinguishable, not that each has applied a conflicting standard as to what constitutes a Fourth Amendment seizure. In *Fisher*, a police officer trying to avoid being hit by an oncoming car, "jumped onto the hood of his police car, simultaneously firing his gun at the car." *Fisher* at 315. The Sixth Circuit determined the car "was the intended target of [the officer's] intentionally applied exertion of force." *Id.* at 318-319. In targeting the car, the Sixth Circuit concluded the police officer intended to stop the car, "effectively seizing everyone inside, including the [passenger]." *Id.* Notably, in *Fisher*, the officer "was not attempting to distinguish between Ms. Fisher [plaintiff] and Ms. Becton [driver]." *Id.* at 318, n. 3. In contrast to *Fisher*, which described the sudden, indiscriminate shooting at a car, the instant case undisputedly involves the controlled and limited use of force by deputies who consciously distinguished between the driver and the passengers. Indeed, in at least four separate instances deputies considered shooting to stop Hart but did not shoot because the passengers were in the potential line of fire. Thus, unlike *Fisher*, the three shots fired in this case were not the product of a sudden, indiscriminate intent to seize a car and all its occupants. Rather, the shots taken in this case were the product of a distinguishing intent

that separated the sole intended object, Hart, from the other individuals, i.e., the passengers.

In the only other Circuit level case Petitioners rely on in arguing a conflict, *Jamieson v. Shaw*, 772 F.2d 1205 (5th Cir. 1985), the Fifth Circuit held the plaintiff had stated a Fourth Amendment claim in alleging she was "seized" when police officers deliberately placed a roadblock in front of the car "in which they knew she was a passenger." *Jamieson* at 1210. The Fifth Circuit applied a broad transferred intent/constructive seizure rationale, concluding that by setting up the roadblock, the police not only sought to seize the driver, but also anyone else in the vehicle. *Id. Jamieson* demonstrates a factual resemblance to *Fisher*, which distinguishes *Jamieson* from the case at bar. *Jamieson* involved the use of a roadblock, a show of authority that does not distinguish between intended and unintended objects riding together in a vehicle that ultimately collides with the roadblock. Just as the officer in *Fisher* indiscriminately fired a weapon at an oncoming car, the officers in *Jamieson* indiscriminately placed a roadblock in the path of an oncoming car. Unlike *Jamieson*, which involved the indiscriminate use of force, it is undisputed at bar that Bauer, rather than indiscriminately shooting at the car, carefully and consciously shot only at Hart. Additionally, in *Keller v. Frink*, 745 F. Supp. 1428 (S.D. Ind. 1990), also cited by Petitioners, the court adopted the broad transferred intent analysis of *Jamieson* over the tighter specific intervention analysis of *Landol-Rivera*, simply concluding the intent to stop a car evidenced an intent to stop all the car's occupants. *Keller* at 1432. *Keller* is distinguishable from the instant case because the officer in *Keller* sought to seize all three individuals he observed commit a criminal act. *Id.* at 1429-1430.

As the opinion below shows, not only are unintended events occurring after, but not caused by the use of force not seizures, but also that no seizure occurs when force intentionally applied to seize one individual injures a person to whom the force was not intended. For example, in *Bublitz v. Cottey*, 327 F.3d 485 (7th Cir. 2003), the Seventh Circuit held police use of a tire-deflation device to stop a fleeing suspect, which subsequently

caused the suspect's car to collide with another car, causing injuries to the other car's occupants, was not a seizure. The Seventh Circuit concluded there was no seizure because the unintended collision between the suspect's car and the second car was not a means intended by police to stop the second car's occupants, but was an "unintended consequence" of an attempt to seize a robbery suspect. *Bublitz* at 489. Notably, the Seventh Circuit expressly rejected plaintiff's argument of "transferred intent," which contended that because a suspect's car was stopped by means intentionally applied, and that act had the further consequence of stopping plaintiff's vehicle, the defendant must have intended to stop plaintiff's car as well. *Bublitz* at 489 ("it does not follow that because [defendant] intended to stop [suspect's] car, he therefore intended to stop any other car that could potentially become involved in a subsequent collision"); *Medeiros* at 826-827 (rejecting "constructive seizure" argument in connection with inability of passenger to escape vehicle during police pursuit); *Patterson v. City of Joplin, Mo.*, 878 F.2d 262 (8th Cir. 1989).

Further, in contrast to *Vaughan II*, where the passenger was the suspect sought, cases that distinguish innocent bystanders or hostages from suspects are determinative of the seizure issue at bar. *Vaughan II* at 1328, n. 4. In *Childress v. City of Arapaho*, 210 F.3d 1154 (10th Cir. 2000), the Tenth Circuit concluded that hostages held by escaped fugitives in the hostages' vehicle were not seized when law enforcement officers, knowing of the hostages' presence, fired upon the vehicle at a roadblock, striking and injuring the hostages. Notably, the Tenth Circuit held the officers' actions were intended to restrain the vehicle and the fugitives, not the hostages inside the vehicle. *Childress* at 1157; *see also Rucker v. Harford County*, 946 F.2d 278 (4th Cir. 1991) (no seizure when officers wounded bystander in attempt to shoot the tires of fugitive's car), *Claybrook v. Birchwell*, 199 F.3d 350 (6th Cir. 2000) (authorities cannot seize "any person other than the one who is the deliberate object of their exertion of force") and *Berg v. County of Allegheny*, 219 F.3d 261 (3rd Cir. 2000)(if officer shoots at fleeing suspect and the bullet inadvertently strikes an innocent bystander, there has been no Fourth Amendment seizure). Thus, "[t]he injuries inflicted were the unfortunate but not

unconstitutional 'accidental effects of otherwise lawful conduct.'" *Childress* at 1157, citing *Brower*, 489 U.S. at 596.

Similarly, in *Medeiros v. O'Connell*, 150 F.3d 164 (2nd Cir. 1998), the Second Circuit held a hostage, injured when police officers fired into a school van attempting to stop a suspect who had commandeered the van, was not seized. The Second Circuit explained, "where the hostage is hit by a bullet intended for the hostage-taker, the mishap is the 'unintended consequence of government action,' and the governing principle is that such consequences cannot 'form the basis for a Fourth Amendment violation.'" *Medeiros* at 169. Thus, "the deflection of the bullet intended for [the hostage-taker] did not transform the troopers' rescue efforts on the hostages' behalf into a seizure." *Id.* Lastly, in *Landol-Rivera*, the First Circuit held a hostage, who was forced at gunpoint into a car, was not seized when a shot fired at the gunman injured the hostage who was sitting directly in front of the gunman in the driver's seat. In reaching its holding the First Circuit, citing *Brower*, stated "a police officer's deliberate decision to shoot at a car containing a robber and a hostage for the purpose of stopping the robber's flight does not result in the sort of willful detention of the hostage the Fourth Amendment was designed to govern." *Landol-Rivera* at 795; *United States v. Lockett*, 919 F.2d 585 (9th Cir. 1990); *Milstead v. Kibler*, 243 F.3d 157 (4th Cir. 2001).

Accordingly, Petitioners were not seized because (1) Petitioners were never the intended objects sought by the deputies' use of force, (2) physical control of Petitioners was not obtained by the deputies' use of force, and (3) the three shots failed to alleviate the threat posed by Hart's aggressive driving, which continued despite the shots. Consistent with this Court's analysis in *Lewis*, and consistent with the decisions of the Eleventh Circuit (*Vaughan*), the Tenth Circuit (*Childress*), the Ninth Circuit (*Lockett*), the Eighth Circuit (*Patterson*), the Seventh Circuit (*Bublitz*), the Sixth Circuit (*Claybrook*), the Fourth Circuit (*Rucker*), the Third Circuit (*Berg*), the Second Circuit (*Medeiros*) and the First Circuit (*Landol-Rivera*), § 1983 liability simply cannot attach to injuries that follow, but are not caused or intended by the use of force. Accordingly, because there is no conflict

between the opinion below and the decisions of this Court and the other circuits, the petition should be denied.

III. Distinguishing what a reasonable officer "could have believed" with what a reasonable officer "would have believed" constitutes a distinction without a difference in analyzing whether the use of deadly force is "reasonable" under the standard set forth in *Graham v. Connor*, 490 U.S. 386 (1989).

Because the undisputed facts show that Petitioners were not subjected to a Fourth Amendment seizure, the Eleventh Circuit was not required to analyze whether the deputies' use of force was objectively reasonable under the Fourth Amendment. Thus, any discussion of the objective reasonableness standard in the opinion below is strictly hypothetical. Indeed, the opinion below states that assuming *arguendo* a seizure had occurred, the Eleventh Circuit agreed with the District Court's determination that the force used by the deputies was objectively reasonable. Pet. at 16a. Similarly, in discussing whether the deputies were entitled to qualified immunity, the opinion below couched its discussion as again assuming *arguendo* a seizure had occurred. *Id.* Thus, as this Court has established that it "does not sit, however, 'to decide abstract, hypothetical or contingent questions,'" *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 284 (1969), any discussion of Petitioners' displeasure about the hypothetical discussion of the objective reasonableness standard in the opinion below is not legally germane to this Court's weighing the merit of the instant petition.

Notably, Petitioners do not quarrel with the District Court's objective reasonableness analysis, which was approved by the opinion below.[2] Pet. at 40a-42a. The District Court's analysis followed this Court's three prong analysis under *Graham*, examining (1) the severity of the crime at issue, (2) whether the

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[2] Petitioners limit their dispute with the opinion below on this point to the Eleventh Circuit's discussion of qualified immunity, the only portion of the opinion below cited relative to their argument. Pet. at 8.

suspect posed an immediate threat to the safety of the officers or others, and (3) whether [the suspect] was actively resisting arrest or attempting to evade arrest by flight. Pet. at 42a-44a, citing *Graham*, 490 U.S. at 396. The District Court's analysis concluded the deputies' actions met the objective reasonableness standard, noting first "**potential criminal activity** occurring in or around the residence was sufficiently severe to satisfy the first prong of the *Graham* analysis." Pet. at 46a (emphasis added). Next, while the District Court acknowledged traffic had been blocked off in the immediate vicinity of the incident scene, "[h]owever, **the possibility of harm to the public** was not eliminated – Bahia Vista is a residential street that connects nearby with heavily-traveled U.S. 41." *Id.* (emphasis added). "Thus, had Hart successfully fled from the scene, his path of flight **could have posed a threat** of death or serious injury to the public." *Id.* (emphasis added).

The cases cited by Petitioners in support of their assertion of a substantial difference between the words "could" and "would" are of dubious value. *United States v. Gaudin*, 28 F.3d 943 (9th Cir. 1994), cited by Petitioners, is a criminal case, with no discussion of the Fourth Amendment objective reasonableness standard. *MacFarlane v. Life Ins. Co. of No. America*, 999 F.2d 266 (7th Cir. 1993), is an insurance policy interpretation case. Moreover, none of the cases Petitioners cite for the so-called "would have" standard identify any purported split of authority or discredit any so-called "could have" standard. Pet. at 9. Similarly, none of the cases Petitioners cite for a "could have" standard identify any purported split of authority or discredit any "would have" standard. *Id.* Indeed, one of the cases Petitioners cite, *Jones v. Webb*, 45 F.3d 178 (7th Cir. 1995), uses both "could" and "would" in discussing the objective reasonableness standard. Thus, while Petitioners argue the terms are not interchangeable, the cases Petitioners cite demonstrate that at least three circuits use the terms interchangeably, with none of those circuits acknowledging any substantive difference between the terms. Thus, Petitioners assertion of a purported split of authority fails to identify a single case where the two "standards" are acknowledged, compared, or where either standard is expressly approved or rejected.

Curiously, Petitioners take issue with what it describes as the speculative analysis in the opinion below. Pet. at 11. However, speculation and assumption are what Petitioners rely on in support of their incorrect contention that "Hart's path of flight" did not pose a threat of serious harm to the officers and the general public. Pet. at 13. Petitioners incredibly maintain Hart's operation of the vehicle did not pose an immediate threat of harm to the deputies when it is undisputed Hart had struck two deputies during his escape, nearly struck others, including Bauer, and after leaving the yard, maneuvered his car around another deputy parked in an unmarked patrol car. Contrary to Petitioners' baseless assertion, Hart was a constant threat of harm to everyone in the vicinity once he started the car and began his reckless escape. Further, Petitioners argue "no civilian was endangered by Hart's operation of the vehicle." *Id.* at 14. This assertion overlooks the fact that the threat posed by Hart's continued aggressive driving was actually realized by the car's collision with the concrete wall and pole.

Because the opinion below discussed objective reasonableness hypothetically, this Court is not obligated to do the same. Even if this Court were to review this portion of the opinion below, Petitioners' assertion of a purported split of authority fails to identify a single case acknowledging the split. Contrary to Petitioners' baseless assertions, neither of the terms "could" or "would" substantively alter the objective reasonableness standard. Accordingly, Petitioners' assertion of a purported split is without merit and should be rejected.

IV. The Eleventh Circuit's conclusion that a suspect's decision to avoid arrest through vehicular flight constitutes an independent, intervening cause when the suspect's decision preceded the use of force and continued unabated following the use of force is not in conflict with decisions of the other circuits.

The opinion below correctly affirmed the District Court's conclusion that Hart's reckless driving was an independent, intervening cause of the passengers' injuries. Pet. at 10a-13a. In affirming, the opinion below recognized Hart began his escape

before any shots were taken, continued as the shots were taken, and continued unabated after the shots, interrupted only by Hart's crashing into a pole nearly a half mile from the driveway. *Id.* at 12a. There is no evidence the deputies did anything to deter Hart from his initial pre-shot decision to escape. Indeed, "Hart's behavior prior to the shots establishes that he had no intention to drive safely regardless of whether shots were fired." *Id.* at 13a.

Petitioners incorrectly interpret the opinion below as causing future vehicular flight cases to result in a finding of no liability based on a lack of proximate causation. A comparison between the case at bar and a Florida case cited by Petitioners demonstrates no such broad based rule has been established. In *City of Pinellas Park v. Brown*, 604 So. 2d 1222 (Fla. 1992), the Florida Supreme Court noted that the driver drove recklessly *after* being pursued by police, i.e. the police pursuit caused the driver to react by driving recklessly. Here, Hart operated the vehicle recklessly before any shots were fired. Thus, it cannot be said that but for the shots, Hart would not have attempted to escape. Indeed, Hart was already attempting to escape before the shots were fired. Indeed, the undisputed facts offer greater support for the proposition that but for Hart's reckless and dangerous escape, no shots would have been fired. Moreover, Petitioners incorrectly assert that the opinion below marks the first time a federal appellate court "espoused the view that a suspect's decision to avoid arrest through vehicular flight constitutes an 'intervening cause.'" Pet. at 15. Indeed, in *Carl v. City of Overland Park*, 65 F.3d 866 (10th Cir. 1995), the Tenth Circuit espoused a conclusion similar to the opinion below; that the decision to evade arrest by initiating a high speed police chase was an intervening cause.

Petitioners continue to offer baseless assumptions as a substitute for facts in arguing Bauer's shots "undoubtedly caused Hart to panic and flee the residence at a much higher rate of speed." Pet. at 17. The undisputed facts lend more support to the notion that the higher rate of speed could be the result of Hart now driving on less resistant pavement rather than across a sandy front yard, not that Hart panicked, another assertion by Petitioners for which there is no record support. Further, Bauer's shooting of Hart

did not prevent Hart from leaving the front yard, rapidly accelerating, braking as he approached an unmarked patrol car, turning to avoid colliding with the unmarked patrol car, going up onto the sidewalk, with at least one deputy witnessing Hart trying to steer the car, and the brake lights flashing a second time just prior to crashing into a pole. Petitioners attempt to minimize the fact that Hart continued to operate the car after being shot. However, Hart's continued operation of the car underscores the inability of the shots to deter Hart from his pre-shot decision to escape. Indeed, as to Hart's operation of the vehicle after being shot, Petitioners incredibly contend the car crashed less than ten seconds after Hart was shot, 0.3 miles from the scene, when no record evidence suggests Hart was traveling at nearly 120 miles per hour, the speed Hart would have been traveling if Petitioners' contentions as to time and distance after Hart was shot are correct.

Lastly, Petitioners incorrectly argue the question of proximate cause where there is an independent, intervening cause is exclusively a jury question. Pet. at 18. To the contrary, Florida law, the law applicable to the question when it was before the Eleventh Circuit,[3] has determined:

> Once it is established that the defendant's conduct has in fact been one of the causes of the plaintiff's injury, there remains the question whether defendant should be legally responsible for the injury. Unlike the fact of causation with which it is often hopelessly confused, this is primarily a problem of law.

Dept. of Transportation v. Anglin, 502 So.2d 896 (Fla. 1987). The cases Petitioner cites from the Second and Sixth Circuits on this issue are inapposite as they do not address how Florida law

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[3] Although proximate causation under § 1983 is a question of federal law, in determining the meaning of the concept courts look to state tort analogs, inasmuch as this Court has made ... "clear that principles of causation borrowed from tort law are relevant to civil rights actions." *Barnes v. Anderson*, 202 F.3d 150 (2nd Cir. 1999), citing *Malley v. Briggs*, 475 U.S. 335, 344 n. 7 (1986).

addresses the issue. Thus, contrary to Petitioners' assertion, the Eleventh Circuit's determination that Hart's actions were the independent, intervening cause of the passengers' injuries was not a premature one.

V. The Eleventh Circuit's qualified immunity analysis followed this Court's standard established in *Saucier v. Katz*, 533 U.S. 194 (2001), when the Eleventh Circuit determined that because the deputies' conduct did not violate a constitutional right, there was no need to determine whether the deputies' conduct violated clearly established law.

The opinion below correctly held Gooding and Bauer were entitled to qualified immunity because neither Gooding nor Bauer had violated a constitutional right. The Eleventh Circuit followed this Court's analysis in *Saucier*, 533 U.S. 194 (2001), where a two step analysis may be required. The opinion below correctly sets forth that analysis as follows: "The first step is to determine whether the facts '[t]aken in the light most favorable to the party asserting the injury ... show the officer's conduct violated a constitutional right[.]' **If the conduct did not violate a constitutional right, the inquiry ends there.** If the conduct violated a constitutional right, a court must move on to the second step and determine 'whether the right was clearly established.' " Pet. at 16a-17a (emphasis added). Curiously, Petitioners neglected to identify the emphasized part of the qualified immunity analysis set forth, *supra*. Indeed, the opinion below agreed with the District Court's determination that the undisputed facts failed to show either Gooding[4] or Bauer violated a constitutional right, at which point the qualified immunity analysis ends under *Saucier*. *Id.* at 21a-22a.

Petitioners emphasize *Saucier* requires courts view the facts in the light most favorable to the non-moving party. Notably, the Eleventh Circuit reviewed the case at bar as an appeal of a

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[4] Petitioners' references to Gooding are of no legal consequence because it is undisputed that Gooding's single shot missed, and this Court has established that an attempted seizure cannot establish a Fourth Amendment violation. *Hodari D.*

summary judgment, which already requires the facts be viewed in a light most favorable to the Petitioners. Pet. at 10a.; Fed. R. Civ. P. 56. However, Petitioners continue to rely on conclusory assumptions rather than record facts in arguing this point. For example, Petitioners surprisingly continue to assert that not only did Bauer know there were passengers in Hart's car, but that the passengers and Hart were unarmed. Pet. at 21. However, the record evidence simply does not support Bauer seeing any passengers or being otherwise aware of them when he fired two shots at Hart. Moreover, there is no record evidence indicating that any SWAT member could have conclusively known whether anyone in the car was armed. Petitioners further assert "Bauer conceded that he fired his weapon solely out of concern for his own safety." *Id.* This purported statement of fact is plainly inaccurate, as Bauer testified that he used force in self-defense, defense of others and to prevent escape, any one of which makes force justified. Petitioners further assert the "evidence" below demonstrated "the sworn testimony of numerous witnesses stating that no officers or civilians were in the path of the moving vehicle when Bauer fired his weapon." Pet. at 20. However, this assertion ignores the testimony of Bauer, who reasonably believed the public and other officers were at risk of harm from Hart's reckless driving, and Regina Wetherington, who believed someone was going to be seriously injured by Hart's reckless driving. Lastly, in one of the more blatant misstatements Petitioners assert as fact, Petitioners cite the Eleventh Circuit's determination that "'Bauer was directly in Hart's path' when he fired his weapon." Pet. at 20. However, the opinion below plainly states, "Bauer was directly in Hart's path as the Oldsmobile accelerated toward him." *Id.* at 20a.

Moreover, viewing the facts in a light most favorable to Petitioners, the record evidence simply does not support the baseless contention that Hart was unarmed, non-dangerous, and posed no immediate threat of harm to anyone. The record evidence demonstrates the contrary. As shown, the facts do not support any officer conclusively knowing any occupant of the car was unarmed. Hart, himself, was "armed" with an automobile that he was undisputedly operating in a reckless manner. Indeed, the record evidence shows Hart's reckless driving caused two deputies to be struck by the car in the front yard, and others to be narrowly

missed. Clearly, to characterize Hart, a felon out on bail after being charged with attempted murder who responded to the deputies' commands to surrender with reckless driving in order to escape, as non-dangerous is to thoroughly disregard the record evidence to the contrary. Thus, even viewing the facts in a light most favorable to the Petitioners, which is what the Eleventh Circuit did, the opinion below correctly determined Gooding and Bauer had not violated a constitutional right; at which point the qualified immunity analysis concludes, consistent with this Court's decision in *Saucier*.

VI. Whether fair notice is provided by *Tennessee v. Garner*, 471 U.S. 1 (1985), that it is unlawful to use deadly force against a fleeing suspect set on evading arrest through vehicular flight where the suspect's car already struck two officers and was a few blocks away from a busy six-lane highway, thereby posing an immediate threat to the general public.

As shown, because the Eleventh Circuit correctly determined Gooding and Bauer had not violated a constitutional right, it was not legally necessary to examine whether the law provided fair warning that the deputies' conduct was unconstitutional. However, Petitioners continue to argue under the baseless premise that Hart was unarmed, non-dangerous, and posed no immediate threat of harm to anyone, and that, accordingly, using deadly force to stop him was unconstitutional under this Court's decision in *Garner*, 471 U.S. 1 (1985). In *Garner*, this Court established that deadly force is "reasonable" under the Fourth Amendment when an officer "(1) has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others or that he has committed a crime involving the infliction or threatened infliction of serious physical harm; (2) reasonably believes that the use of deadly force was necessary to prevent escape; and (3) has given some warning about the possible use of deadly force, if feasible." *Garner*, 471 U.S. at 8-9.

Petitioners reliance on this Court's decision in *Brosseau v. Haugen*, 543 U.S. 194 (2004), is inexplicable for two reasons.

First, this Court established that qualified immunity analysis calls for courts to determine whether the law, in relation to the specific facts confronting the officer **when he acted**, was clearly established. *Anderson v. Creighton*, 483 U.S. 635 (1987). There is no dispute the acts at issue occurred on September 30, 1999, approximately five years before this Court's decision in *Brosseau*. Thus, *Brosseau* cannot inform Gooding and Bauer as to the constitutionality of their acts on the date of the incident. Accordingly, Petitioners' reliance on *Brosseau* is misplaced and should be rejected. Second, assuming *arguendo Brosseau* was relevant to the qualified immunity inquiry in this case, Petitioners dubiously cast the case at bar as an "obvious case" where the fleeing suspect did not pose an immediate threat of death or serious harm to the officer or others. Pet. at 23. In *Brosseau*, the officer believed the suspect was armed and posed an immediate threat of serious harm to officers and others, some of whom were within a few feet of the suspect's car. Petitioners argue that because the case at bar does not match *Brosseau* factually; it must factually match the "obvious case" that violates the *Garner* standard. Petitioners' argument adheres to the baseless assumption that neither Gooding nor Bauer had probable cause to believe Hart posed an immediate risk of death or serious harm to any officer or the general public.

Even if one could debate Bauer's judgment it cannot be said there was absolutely no basis for Bauer to think probable cause existed. Indeed, Hart's aggressive, reckless driving, his use of the car as a weapon to cause deputies to jump to avoid being struck undisputedly involved the threat of serious harm. Further, Bauer knew of Hart's history of violence, including attempted murder, and the real risk Hart presented to anyone down the road, including at least one officer in an unmarked patrol car in the next intersection whom Hart maneuvered to avoid striking prior to crashing into a pole. The exigencies of the situation facing Bauer did not permit the lawyerly debate in which Petitioners engage to minimize the threat Hart posed to anyone whose path he crossed. Similarly, Gooding testified that before he shot at a rear tire he was concerned for his own safety and the safety of other SWAT members standing in close proximity to Hart's car as it began its reckless flight attempt. To conclude Gooding and Bauer did not

have probable cause to use force against Hart in this dangerous situation is to disregard the record evidence that both deputies concluded Hart posed a serious risk of harm to themselves and others. Of course, as shown, it was not necessary for the Eleventh Circuit to determine whether the officers had fair warning as to the constitutionality of their conduct as the Eleventh Circuit correctly concluded, based on the undisputed record evidence, that neither Gooding nor Bauer had violated any constitutional rights. Moreover, even assuming *arguendo* a constitutional violation had occurred, and that this Court had ruled in *Brosseau* at the time of the incident at bar, the law was not clearly established that Gooding and Bauer's conduct was unconstitutional.

VII. The Eleventh Circuit's determination that summary judgment was appropriate in an official capacity claim under 42 U.S.C. § 1983 where no underlying constitutional violation occurred is not in conflict with decisions of the other circuits.

Contrary to Petitioners' erroneous assertion, the opinion below did address the Petitioners' claims of "municipal liability" under § 1983. Petitioners sought to establish municipal, i.e. official capacity liability under three theories: (1) a purported "persistent failure to discipline"; (2) ratification; and (3) failure to train. In addressing those claims, the opinion below followed this Court's analytical standards in correctly affirming the dismissal of Petitioners' official capacity claims.

This Court has established that suits against government officials in their official capacities are actually suits against the governmental entity the officials represent. *Kentucky v. Graham*, 473 U.S. 159 (1985). Thus, the official capacity claims against Balkwill are actually claims against him as Sarasota County Sheriff, an independently elected constitutional officer. Fla. Const. Art. VIII § 1(d); *see also* § 2.4, Charter, Sarasota County. To establish § 1983 liability against an official in his official capacity, a plaintiff must demonstrate a "policy or custom" of the governmental entity was the moving force *of a constitutional violation. Monell v. Dept. of Social Services*, 436 U.S. 658 (1978). However, no § 1983 liability attaches to a governmental entity if

the underlying actions of the individuals caused no constitutional injury.[5] *Heller*, 475 U.S. 796 (1986); *Baker v. McCollan*, 443 U.S. 137, 140 (1979)(underlying constitutional injury must be shown before any consideration may be given the entity's policy or custom). Thus, Petitioners must show Gooding and/or Bauer caused a constitutional deprivation before there may be any examination of a policy or custom of the Sheriff under § 1983. As the Eleventh Circuit correctly held, Petitioners could not show a constitutional deprivation by Gooding or Bauer. Thus, consistent with this Court's standard, there was simply no legal basis to consider the policies or customs of the Sheriff.

Further, the Eleventh Circuit's declining to examine the policies and/or customs of the Sheriff in light of determining there was no underlying violation is consistent with decisions from the other circuits addressing the same issue. *Trigalet v. City of Tulsa*, 239 F.3d 1150 (10th Cir. 2001); *Fairley v. Luman*, 281 F.3d 913 (9th Cir. 2002); *Wilson v. Spain*, 209 F.3d 713 (8th Cir. 2000); *Durkin v. City of Chicago*, 341 F.3d 606 (7th Cir. 2003); *Bowman v. Corrections Corp. of America*, 350 F.3d 537 (6th Cir. 2003); *Alpha v. Hooper*, 2006 WL 337458 (5th Cir. Feb. 15, 2006); *Altman v. City of High Point*, 330 F.3d 194 (4th Cir. 2003); *Grazier v. City of Philadelphia*, 328 F.3d 120 (3rd Cir. 2003); *Curley v. Village of Suffern*, 268 F.3d 65 (2nd Cir. 2001); *Jarrett v. Town of Yarmouth*, 331 F.3d 140 (1st Cir. 2003).

A. Section 1983 Failure to Discipline and Ratification Claims

Moreover, assuming *arguendo* a constitutional violation occurred, the Eleventh Circuit correctly affirmed the District Court's conclusion, based on the investigations conducted by the Sheriff's Criminal Investigations Bureau and Shooting Review Board, the State Attorney, and the United States Department of

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[5] Similarly, in the absence of an underlying violation, the opinion below did not need to go any further in analyzing Petitioners' claim of supervisory liability under § 1983 against Gooding, as such a claim fails as a matter of law in the absence of an underlying violation. *Polk County v. Dodson*, 454 U.S. 312 (1981).

Justice, that the actions of Gooding and Bauer did not warrant disciplinary action. Pet. at 68a-73a. Further, even if disciplinary action had been warranted, Petitioners failed to demonstrate the Sheriff had "persistently failed to take disciplinary action such that he has established a custom ratifying use of force." *Id.* at 72a. Petitioners, however, curiously contend that "undue emphasis" was placed on the multiple investigations done after the subject incident, incorrectly asserting the District Court failed to address a purported "persistent failure to take disciplinary action in other officer-involved shooting incidents." *Id.* at 25.

Petitioners' broad based and factually unfounded assertion comes from a cursory review of instances only involving the discharge of firearms. Petitioners' unfounded assertion continues to disregard the undisputed record evidence of the Sheriff's investigation and resolution of all use of force incidents. Petitioners first reference then Sheriff Monge's deposition, where Petitioners' counsel indiscriminately referenced "20 to 30 shootings" over a period of 15 years, with no evidence to show how many of those shootings even involved shooting at suspects, as opposed to mere accidents. In fact, Petitioners continue to ignore that Monge testified in his deposition that he recalled "two or three situations" where there were findings of "wrongdoing" by deputies relative to shootings, and disciplinary action in the form of remedial training was implemented in response. Instead, Petitioners would have this Court assume all the shootings referred to during Monge's deposition were intentional despite the absence of evidence supporting that assumption. Petitioners further assume Monge's inability to recall specifically any excessive force findings or any related disciplinary action during the referenced 15-year period demonstrates there were no excessive force findings or any related disciplinary action when Petitioners present no evidence to support that assumption.

Petitioners also cite the testimony of Lieutenant Crepeau, as purported evidence of a persistent failure to discipline because "'no complaint found to have merit was made against [any] Sarasota County Sheriff's deputy from 1992 to September 30, 1999' which involved the use of deadly force with a firearm or a

motor vehicle." Pet. at 26. However, Crepeau's uncontradicted affidavit testimony references records that clearly demonstrate use of force complaints made against Sarasota County Sheriff's deputies, which encompass more than just employee-involved shootings, were investigated by the Internal Affairs Unit, and where such complaints had merit, the Sheriff responded with remedial action, including discipline. Thus, Petitioners' repetition of the bare assertion there has never been a finding of "excessive force" completely and inexplicably ignores clear, undisputed, record testimony to the contrary. Notably, it is undisputed neither Petitioners nor Petitioners' sole expert independently reviewed any of the earlier officer-involved shooting investigations. Petitioners have simply continued to fail to provide a factual basis upon which to attack the adequacy of any prior officer-involved shooting investigation because Petitioners continue to offer only assumption and speculation as a troubling substitute for record evidence.

Further, Petitioners' continued reliance on statistical data alone cannot establish the existence of an actionable custom. A careful reading of the cases Petitioners offer on establishing a custom using statistical data alone shows those cases cited more than just statistical data showing a low percentage of sustained excessive force complaints. *Samples v. City of Atlanta*, 846 F.2d 1328 (11th Cir. 1988)(testimonial evidence of informally training officers to have "shoot-to-kill" attitude, which became established practice); *McCray v. City of Dothan*, 169 F. Supp. 2d 1260 (M.D. Ala. 2001)(city adopted no policy on deadly force); *Kindle v. City of Harvey*, 2002 WL 230779 (N.D. Ill. 2003) and *Robinson v. City of Harvey*, 2001 WL 138901 (N.D. Ill. 2001)(cursory policy on deadly force and investigations). Curiously, Petitioners also cite *Fiacco v. City Rensselaer*, 783 F.2d 319 (2nd Cir. 1986), as support for the proposition that the sheer volume of past complaints, regardless of their merit, may be relied upon in establishing an actionable custom. However, *Fiacco* was decided before this Court's decision in *City of Canton v. Harris*, 489 U.S. 378 (1989), which rejected the very proposition *Fiacco* stands for, that the sheer volume of past complaints, regardless of their merit, may be relied upon in establishing an actionable custom. Thus, *Fiacco*, for the proposition Petitioners assign to it, is inconsistent with the decisions of this Court and those of the Eleventh Circuit. *Gold v.*

City of Miami, 151 F.3d 1346 (11th Cir. 1998); *see also Ott v. City of Mobile*, 169 F. Supp. 2d 1301, 1311 n. 9 (S.D. Ala. 2001)(the need for more or better training may be obvious where a *pattern of constitutional violations* exists). Accordingly, Petitioners' reliance on *Fiacco* is misplaced and should be rejected.

B. Section 1983 Failure to Train Claim

Additionally, again assuming *arguendo* a violation occurred, the Eleventh Circuit correctly affirmed the District Court, which found (1) the training provided by the Sheriff regarding the use of deadly force "was adequate in relation to the tasks that the SWAT team members performed;" (2) even if the training was inadequate, Petitioners failed to prove the failure to train manifested deliberate indifference by the Sheriff to the safety of the general public; and (3) a single incident failed to establish the existence of a governmental policy predicated on a purported failure to train. Pet. at 74a-78a.

This Court has established there are "limited circumstances" in which a local government will be held liable because it inadequately trained its employees, who then infringed upon a plaintiff's constitutional rights. *City of Canton*. Those circumstances occur where the failure to train amounts to deliberate indifference to the rights of persons with whom individual government officials come into contact. *Id.* Proof of deliberate indifference cannot be established by evidence of simple or heightened negligence because deliberate indifference describes a knowing, conscious decision to do nothing in response to a pattern of prior constitutional violations. *Id.*, 489 U.S. at 389-391. A need for training "will be proven when there is sufficient evidence that: (1) the government's employees 'face clear constitutional duties in recurrent situations,' or (2) 'a pattern of unconstitutional violations exists such that the [government] knows or should know that corrective measures are needed.'" *Young v. City of Augusta*, 59 F.3d, 1160, 1172 (11th Cir. 1995). As to the first category, this Court has given only one hypothetical example of a need to train being so obvious in the absence of prior constitutional violations -- training on the constitutional limitations

on the use of deadly force where the government provides firearms to law enforcement officers. *City of Canton*, 489 U.S. at 390, n. 10. Notably, this Court does not require a government to adopt or follow any specific procedures in order to avoid § 1983 liability for failure to train. *Id.*, 489 U.S. at 390-391. In fact, this Court established it is not enough to show a particular officer was inadequately trained, or there was negligent administration of an otherwise adequate training program, or the conduct resulting in the injury could have been avoided by more or better training. *Id.* Thus, courts examine only whether the government responded to prior misconduct with remedial action, with no inquiry into the manner or quality of the government's response because this Court has instructed federal courts not to become involved "in an endless exercise of second-guessing municipal employee-training programs." *Id.* Accordingly, absent a history of prior, similar constitutional violations showing knowledge on the government's part of a need to train, no § 1983 liability attaches. *Id.*

At bar, Petitioners continue to incorrectly assert the Sheriff did not provide any training to his officers regarding the use and limitations of deadly force during motor vehicle pursuits, relying on the "testimony of no fewer than six Sarasota County law enforcement officers." Pet. at 27-28. The testimony of six witnesses cited by Petitioners focuses only on the act of "shooting at a moving vehicle," from which Petitioners continue to incredibly assert the Sheriff "did not provide any training to its officers regarding the use and limitations of deadly force during motor vehicle pursuits." A review of the undisputed record evidence plainly shows Petitioners' assertion is incorrect. Indeed, Bauer did not shoot at a moving vehicle; he shot at the driver, Hart. Gooding did not just open fire on a moving vehicle. In a very controlled, low risk attempt, Gooding shot a single bullet at the lower half of a rear tire, which he missed. Gooding and Bauer's three careful, limited shots at specific targets are clearly distinguishable from indiscriminately blasting away at a moving car. Further, the Sheriff's head of in-service training testified deputies are trained on applications of deadly force in situations involving motor vehicles, including considerations of the circumstances and consequences of shooting at a moving vehicle. Thus, Petitioners' continued assertion the Sheriff provided no training on applications of deadly

force relative to motor vehicles completely disregards the undisputed record evidence. The cases Petitioners urge provide support of their argument are inapposite. In *Cooper v. Merrill*, 736 F. Supp. 552 (D. Del. 1990) and *Frye v. Town of Akron*, 759 F. Supp. 1320 (N.D. Ind. 1991), both courts applied the "obviousness" footnote in *City of Canton* to training regarding *high-speed police pursuits*, which is not what Petitioners seek to show is "obvious" in this case.[6] Rather, Petitioners assert that training on firing weapons at motor vehicles is obvious.

The undisputed record evidence does show all the deputies involved in the incident were fully trained regarding both the legal requirements concerning the use of deadly force as well as the heightened standard under the Sheriff's internal policy on the use of deadly force. The training records, Hoffmeister's deposition, Kenney's affidavit and testimony of Gooding, Bauer and other SWAT members involved in the incident all show many hours use of force and deadly force training that included both proficiency and judgment training, i.e. learning how to shoot and deciding when it is appropriate to use deadly force, including situations involving motor vehicles. Indeed, both Gooding and Bauer demonstrated at their depositions they understood in the face of this incident they could use deadly force in a motor vehicle situation only if there was an imminent threat of serious harm or death to themselves, a fellow officer or member of the public, in addition to stopping a fleeing felon who presented a similar risk. Moreover, Petitioners' own expert acknowledged the training given was enough to equip the deputies to have decided whether to use deadly force in that particular situation. Thus, the evidence is overwhelming that the Sheriff both had a policy addressing the constitutional limitations on the use of deadly force, and provided training on those limitations. Lastly, Petitioners are unable to provide evidence of frequent, prior, similar constitutional violations regarding the use of deadly force involving motor vehicles and fleeing felons, without which the need for additional

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[6] The other case cited by Petitioners, *Kibbe v. Thurston*, 777 F.2d 801 (1st Cir. 1985), is a pre-*Canton* decision, but also discusses training relative to high-speed police pursuits, which, as shown, is not what Petitioners seek to show is "obvious" in this case.

training cannot be established. Thus, liability under § 1983 for the failure to train law enforcement officers cannot be established even if it could be shown an underlying violation had occurred.

Because the Eleventh Circuit correctly concluded there was no underlying violation, no § 1983 liability attaches to the Sheriff. This conclusion is consistent with this Court's decisions and the decisions of the other circuits, which do not require examination of an official policy or custom unless there is an underlying violation. Moreover, assuming *arguendo* a violation had occurred, the undisputed facts confirm the District Court's conclusions that Gooding and Bauer's actions did not warrant discipline, that Petitioners failed to establish a persistent failure to discipline by the Sheriff, and further failed to demonstrate this case fits the limited circumstances where a purported failure to train may establish § 1983 liability. Thus, for this additional reason, the petition should be denied.

CONCLUSION

Because the opinion below is not in conflict with the decisions of the other circuits and correctly applied this Court's standards to the issues presented, the petition should be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

DIANNE TROUPE, as Personal Representative for the Estate of Ricardo Robinson, Deceased, et al.,

Petitioners,

v.

SARASOTA COUNTY, FLORIDA, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

In their Opposition Brief, Respondents claim that Petitioners' arguments "are frequently based on assumptions and conclusions having no record support, . . . masquerading as facts." (Opp. Brief, at p. 3). Contrary to Respondents' claim, *every one* of Petitioners' factual statements are amply supported by the evidence, and, where appropriate, Petitioners will identify for this Court those portions of the record below that support Petitioners' arguments. Given the parties' dispute about the evidence contained in the record, Petitioners urge this Court to request that the clerk of the lower court having possession of the record certify and transmit it to this Court. Upon review of the lower court record, including the forensic evidence, photographs, incident reports and witness testimony, this Court will see that the so-called "undisputed" facts posited by the Respondents are in fact *disputed* and actually support the claims advanced by the Petitioners in the underlying lawsuit.

REASONS FOR GRANTING THE PETITION

I.

The Eleventh Circuit's Application of the Fourteenth Amendment Due Process Standard in Analyzing The "Seizure" Issue Is Not Mere Surplusage, But, Rather, Is The Underpinning Of Its "No Seizure" Determination.

Respondents make no attempt to justify the Eleventh Circuit's use of *Fourteenth Amendment* due process principles in evaluating the "seizure" issue. Instead, Respondents ask this Court to disregard the lower court's Fourteenth Amendment analysis altogether by claiming it was merely "*in addition to*" and not in lieu of, the Fourth Amendment seizure analysis. (Opposition Brief, at pp. 3-4).

There is no indication, however, in the Eleventh Circuit's opinion that its use of Fourteenth Amendment principles was merely an "*additional*" analysis which could be viewed separate and apart from the Fourth Amendment. The Eleventh Circuit's opinion in that regard (see pp. 14a-15a of Appendix to Petition) does not reveal any such intention. Rather, as is evident from the court's opinion, the Eleventh Circuit's focus on the Fourteenth Amendment was the centerpiece of that court's analysis of the "seizure" issue:

- "Force regardless of the form directed to a driver of a vehicle--particularly one attempting to flee--*does not give rise to a due process deprivation claim* unless it was exercised with 'a purpose to cause harm' unrelated to the legitimate object of arrest."

- The plaintiffs do not allege that Gooding or Bauer had the intent to cause harm unrelated to the arrest."

(Appendix 14a-15a of Petition for Writ of Certiorari).

The foregoing portions of the Eleventh Circuit's opinion appear squarely in the middle of that Court's "seizure" analysis, and there is no statement or suggestion anywhere in the Court's opinion that the above-quoted language was part of some "additional" analysis. It is the crux of the analysis on the seizure issue. Indeed, if one were to eliminate the above-quoted language, the Eleventh Circuit's analysis on the seizure issue would be incomplete. The Court's reference to the Fourteenth Amendment is puzzling inasmuch as no such claim was being asserted. The danger in allowing such an analysis to stand is obvious: it would subject victims of police excessive force--particularly in the context of vehicular pursuits--to an insuperably high standard, and one which is contrary to this Court's precedent.

II.

The Vehicle's Passengers Were Also The Intended Objects Of The Police Use of Deadly Force.

Respondents next argue that the lower court's seizure analysis was correct because Robinson and Waiters (the vehicle's passengers) were not the "intended objects" of the police use of force. The record below, however, reveals otherwise. Not only were Bauer and Gooding acutely aware of the passengers' presence inside the vehicle, but they also believed them to be **criminal suspects**, as evidenced by their statements following the shooting. (*See* D.E. 159 [Plaintiff's Statement of Disputed Facts] at ¶16; D.E. 152, Ex. 43 [Bauer CIB Statement] at SSO789 ["We got to Temple Beth Shalom a very short time because we were told that the **suspects** had entered a vehicle in front of the residence."]; at SSO791 (stating that he was "**watching the bad guys**" during the encounter in the driveway]; D.E. 152, Ex. 32 [Gooding Use of Firearms Report] at SSO747 [Gooding's statement that with knowledge of the "**two other subjects**," he shot "in an attempt to prevent prolonged flight."]). Moreover, Sheriff Monge, who at the time was the Sheriff of Sarasota County, stated in a November 9, 1999 News Release that Robinson and Waiters both "[had] **lengthy criminal records**." (D.E. 152, Ex. 67 [11/9/99 News Release] at SSO25). Based upon the foregoing statements by Bauer, Gooding and Monge, it can reasonably be inferred that the officers' actions were also directed against the two passengers, in addition to Ryan Hart.

Despite the clear import of the above statements, Respondents attempt to diminish their importance by characterizing them as "colloquial police parlance" and "inconsequential labels." (Opposition Brief, at pp. 7-8). However, there is nothing colloquial or inconsequential about the terms "**bad guys**," "**suspects** [plural, not singular], "**subjects**," and, most of all, the reference to Robinson's and

Waite[illegible]supposed "**lengthy criminal records.**" If the passen[illegible] were not also intended targets, then why mention their criminal records at all or refer to them as "bad guys"? Such statements give the clear impression that the officers were well aware of the presence of the two passengers, and considered them to be involved in potential criminal activity.

Moreover, in arguing that the actions of Bauer and Gooding did not rise to the level of a Fourth Amendment "seizure," Respondents rely exclusively on cases where the injured victim was either: (1) a "hostage" who the officers were clearly trying to avoid injuring; or (2) an "innocent bystander" injured away from the vehicle that was the intended target. (Opposition Brief, at pp. 11-13, citing *Childress v. City of Arapaho, Okla.*, 210 F.3d 1154 (10th Cir. 2000) (finding in hostage shooting case, no seizure because "the officers intended to restrain the minivan and the fugitives, not [the hostages]"); *Medeiros v. O'Connell*, 150 F.3d 164 (2d Cir. 1998) (finding no seizure occurred where hostage was struck by an errant bullet); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791 (1st Cir. 1990) (holding that a hostage injured when police fired at a suspect's getaway car was not "seized" for Fourth Amendment purposes); *Rucker v. Hartford County*, 946 F.2d 278 (4th Cir. 1991) (bystander not seized by police bullet aimed at fleeing vehicle); *Bublitz v. Cottey*, 327 F.3d 485 (7th Cir. 2003) (no seizure where officer attempted to stop a fleeing robbery suspect by using a tire deflation device, causing the suspect to lose control of his vehicle and collide with plaintiff's minivan); *Lee v. Williams*, 138 F.Supp.2d 748 (E.D. Va. 2001) (hostage was not "seized" under Fourth Amendment when officers, intending to subdue a robbery suspect, accidentally shot hostage),

Such cases are of no relevance to the "seizure" inquiry. Petitioners were neither "hostages" nor "innocent bystanders" who were injured away from the targeted vehicle. They were in the specific vehicle that was the

"intended target" of the officers' gunfire; the officers were aware of the presence of Robinson and Waiters when they shot at the vehicle; and far from being thought of as hostages or innocent bystanders, Robinson and Waiters were considered "suspects" by both officers. (*See* District Court Docket Entry No. 152, Doc. 43, Bauer CIB Statement, at SSO789 [referring to passengers as "suspects"]; "at SSO791 [referring to occupants of vehicle as "the bad guys"]; Doc. 67, 11/9/99 News Release at SSO25 [noting the supposed "lengthy criminal records" of Robinson and Waiters]). Accordingly, the "hostage" and "innocent bystander" line of cases cited by the Respondents are wholly inapposite.

III.

Physical Control Of The Vehicle's Passengers Was Obtained Through The Police Use of Deadly Force.

Respondents next argue that there was no seizure because "physical control" of the vehicle was not obtained by the officers' use of deadly force. (Opposition Brief, at pp. 5, 7, 9 & 13). Specifically, Respondents argue that there was no Fourth Amendment seizure because the deadly force applied by Bauer and Gooding did not "succeed" in stopping the vehicle, and that the vehicle crashed solely as result of Hart's reckless driving after being shot in the back. (*Id.*, at p. 7).

Respondents' attempt to distance the shots fired by Gooding and Bauer from the deadly crash ignores the overwhelming evidence in this case that the officers used deadly force with the specific intention of disabling the vehicle, and that goal was in fact accomplished. Indeed, Hart died as a result of the gunshot wounds inflicted by Bauer and, further, the vehicle crashed a mere "five to ten seconds" after Hart was shot. (*See* D.E. 152, Ex. 21 [Weatherington Depo.] at 70:8-70:12; D.E. 152, Ex. 3 [Sarasota Police Department Investigation], at SSO1152-1154, 1189, 1199 & 1250; D.E.

152, Ex. 9 [Medical Examiner's Autopsy Report of Ryan Hart], at SSO725; D.E. 152, Ex. 7 [Medical Examiner's Report], at SSO0719). It can reasonably be inferred from this evidence that the officers' use of deadly force was one of the causes--if not the leading cause--of the crash, and that had the officers refrained from shooting, the vehicle would almost assuredly not have crashed. Thus, there is no merit to Respondents' specious claim that "physical control" of the Petitioners was not obtained by the officers' use of deadly force. *See, e.g., Ivory v. City of Minneapolis*, 2004 U.S. Dist. LEXIS 15199, at *4 & *12 (D. Minn. Aug. 4, 2004) (passengers of vehicle were "seized" even though vehicle crashed several blocks away from where shots were fired).

IV.

Gooding is Legally Responsible for Petitioners' Catastrophic Injuries Even Though His Shot "Missed."

Respondents next argue that the Gooding's "missed shot" is of no legal consequence. (Opposition Brief, at p. 9). Such an argument is contrary to well-established case law. Under the analytical approach espoused in virtually every circuit court of appeals, Gooding, despite the missed shot, would still be legally responsible for Robinson's and Waiter's injuries by virtue of the fact that: (1) Gooding "acted in concert" with Bauer and the other SWAT team members, and their collective actions were part of a "team effort," *see, e.g., Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 561 (1st Cir. 1989); *Grandstaff v. Borger*, 767 F.2d 161, 168 (5th Cir. 1985); (2) Gooding was Bauer's immediate "supervisor" and personally participated in the incident, thereby giving rise to "supervisory liability" under section 1983, *see, e.g., Jeffers v. Gomez*, 267 F.3d 895, 915 (9th Cir. 2001); *Worrell v. Henry*, 219 F.3d 1197, 1214 (10th Cir. 2000); and (3) Gooding caused Robinson and Waiters to be subjected to a deprivation of protected rights by "setting into motion the

series of events" which Gooding knew or reasonably should have known would result in the constitutional deprivation. *See, e.g., Sales v. Grant*, 158 F.3d 768, 776 (4th Cir. 1998); *Cartagena*, 882 F.3d at 560-61. Therefore, despite the Respondents' argument to the contrary, any one or more of the foregoing cognizable theories permits the imposition of individual liability on a law enforcement officer even where he does not discharge his firearm, let alone shoot and miss.

V.

The "Would/Could" Issue Is Not Merely A Distinction Without A Difference, As The Federal Courts Have Acknowledged This Issue In Fourth Amendment Cases.

In the portion of their brief directed to the "reasonableness" inquiry under *Graham v. Connor*, Respondents make several inaccurate statements. First, they claim that the "*could have*" versus "*would have*" dichotomy raised by Petitioners is a "distinction without a difference." (Opposition Brief, at p. 14). They could not be more wrong. This Court has previously stated that the use of deadly force constitutes an "unmatched" intrusion on a suspect's Fourth Amendment rights, *Tennessee v. Garner*, 471 U.S. 1, 9 (1985), and requires a higher level of present threat than other police uses of force. To suggest that there is *no* appreciable difference between "would" and "could" in this context is fallacious, for the former connotes a likelihood of occurrence, whereas the latter conveys only some mere probability of indeterminate size. There is a huge difference between the two concepts, and to allow a law enforcement officer to escape liability simply because it was "theoretically possible" (but not probable) that the suspect posed an imminent threat of danger to the officer or others would do violence to this Court's opinion in *Graham*.

Second, Respondents falsely claim that no court has ever identified a split of authority on the "could have" versus

"would have" issue. (Opposition Brief, at p. 15). Regardless of whether this is literally true (and, as shown below, it is not), the fact remains that some circuits do apply the "could have believed" standard, while other circuits apply the "would have believed" standard, and some circuits apply *both* standards (sometimes even in the same opinion). (Petition, at pp. 8-15). Clearly, there is a difference in the approaches taken by the federal circuit courts; enough to merit the review by this Court.

Moreover, a number of courts have acknowledged that there is a split of authority on the "would have/could have" issue in other Fourth Amendment contexts, such as examining whether, and under what circumstances, a "traffic stop" by a law enforcement officer violates the Fourth Amendment. *See, e.g., United States v. Ferguson*, 8 F.3d 385, 388 (6th Cir. 1993) (comparing the two different analytic approaches). Although this Court, in *Whren v. United States*, 517 U.S. 806, 813, 116 S.Ct. 1769, 1774-75 (1996), legitimized the "could have" test in assessing the reasonableness of a warrantless traffic stop, there is a world of difference between a traffic stop, on the one hand, and the use of deadly force, on the other hand, both in terms of impact to the victim and the possible consequences to the police officer. Clearly, the decision whether to use a firearm poses a much graver threat than the decision whether to execute a warrantless stop on a vehicle. Given this "life and death" difference between the two situations, a "could have believed" standard is not an appropriate test for judging the reasonableness of deadly force.

VI.

Hart Did Not Strike Any Officers During His Escape, And Any Perceived Threat Existing At An Earlier Point in Time Does Not Provide An Ongoing License to Shoot.

Finally, in arguing that the officers' use of deadly was reasonable, Respondents make the incredible assertion that

"it is *undisputed* Hart had struck two deputies during the escape . . . and was a constant threat of harm to everyone in the vicinity . . ." (Opposition Brief, at p. 16) (emphasis supplied). Contrary to Respondents' assertion, the evidence in this case reveals that no officers were struck--or even grazed--by Hart's vehicle. Indeed, several of the SWAT officers acknowledged that no one was struck by the vehicle. (D.E. 152, Ex. 24 [Investigative Report] at SSO650 ["Butsch states he stepped out of the way and saw Mike Kennedy jump out of the way."]; D.E. 152, Ex. 114 [Mercurio Depo.] at 18:22-18:24; D.E. 152, Ex. 118 [Pollack Depo.] at 22:8-22:10 (stating that he did not see the vehicle strike any officers); D.E. 152, Ex. 103 [Butsch Depo.] at 74:7-76:2 & 82:21-82:24 [testifying that he did not observe any SWAT officer struck by the vehicle as it was moving in the driveway or across the front yard]; D.E. 152, Ex. 113 [McElyea Depo.] at 75:25-76:2 & 87:25-88:3 [acknowledging that he did not see any SWAT officer "struck" by the vehicle]; D.E. 152, Ex. 117 [Pezzella Depo. at 21:19-21:21 [acknowledging that he was able to "jump out of the way" of the vehicle]).

Regardless, even if any of the SWAT officers were struck or "grazed" by Hart's vehicle during its initial back-and-forth maneuvering in the driveway, such alleged contacts occurred well **before** the point in time that Bauer and Gooding applied deadly force. As recognized in the District Court's Opinion, the purported striking of the two officers took place during the initial driveway encounter. (Petition Appendix 29a-31a). However, Bauer and Gooding did not fire their weapons until **after** the vehicle had already pulled out of the driveway and turned left into the front yard. (*Id.*). Thus, the alleged danger to the officers had already passed.

The mere fact that there may have been a threat to a law enforcement officer at an earlier point in time does not give Bauer and Gooding the right to shoot Hart for the duration of the incident. When the alleged threat passes, so

does the right to use deadly force. *See, e.g., Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999) ("Even assuming Raso was in front of the car and was in danger at some point, a jury could find, notwithstanding her testimony, that she did not fire until it was no longer objectively reasonable for her to believe she was in peril. A passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect."); *Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993) ("'When an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot any time thereafter impunity."). Since it is undisputed that Bauer and Gooding fired their weapons only **after** the point in time that the other two officers were allegedly grazed by the vehicle during the initial driveway encounter, they did not retain the right to shoot any time thereafter with impunity.

CONCLUSION

For the foregoing reasons, and for those stated in their original Petition, Petitioners Dianne Troupe and Leon Waiters, Jr. respectfully request that the Supreme Court of the United States grant their petition for writ of certiorari.

Respectfully submitted,

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